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ABSTRACT

This publication is intended to outline basic legal issues in key areas confronting the postsecondary education community, and to provide background information of which every college administrator should be aware. Chapter I, "Employment, Evaluation, and Retention or Nonretention of Faculty and Staff," discusses the legal obligations and rights of institutions of higher education as employers. Chapter II, "Security on the Campus," deals with the growing complexities of problems related to student unrest and the increasing incidence of crime on campus. Chapter III, "Copyright on Campus," summarizes some of the elements of copyright law so that administrators can be alert to potential rights and problems, and can recognize the need and appropriate time to secure the services of experienced legal counsel. Chapter IV, "Disputes Settlements--Grievance and Arbitration Procedures," details the objectives to be used in developing and implementing grievance procedures, frequent subjects of grievances, and typical arbitration procedures. Chapter V, "Dealing with Federal Regulatory Agencies," discusses the extended constitutional rights of students and teachers as recognized by the courts, the increasing power of federal regulatory agencies, and the methods an institution may use to challenge arbitrary agency actions. (DC)

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LEGAL ISSUES for POSTSECONDARY EDUCATION

Briefing Papers II

Editor: Dennis H. Blumer

Second of Two Sets of Papers Concerned with the Myriad of Legal Issues Facing the Postsecondary Education Community

JC 760 151

American Association of Community and Junior Colleges

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Editor: Dennis Hull Blumer

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Foreword

The American Association of Community and Junior Colleges is pleased to present *Legal Issues for Postsecondary Education Briefing Papers II.* This publication of a two-part publishing project covers topics which are or should be of great concern to persons in community and junior colleges as well as other institutions of higher education. Such matters as grievance procedures, hiring and firing, copyright, campus security, and relations with federal regulatory agencies impinge significantly on the time and attention of administrators, trustees, faculty, and staff of colleges and universities. These are the topics of this book—treated by authors with both legal and collegiate expertise. The information contained herein is provided to bring about better understanding of the legal issues, to sensitize the reader to problems that can arise.

Briefing Papers I, published in late 1975, focused on the following topics: "Some General Thoughts on Postsecondary Education and the Law;" "Legal Liabilities of Administrators and Trustees;" "Legal Liability of Faculty;" "Developing a Faculty and Staff Personnel Records Policy;" and "The First Amendment Freedoms of Speech, Press, and Association." We believe that first volume provided an appropriate introduction to the issues discussed in this volume.

AACJC appreciates the cooperation of the National Association of College and University Business Officers and the National Association of College and University Attorneys in this publishing activity. We are grateful as well to the Ford Foundation for its support of the project. It is our hope that these publications will help to fill a gap in information currently available on legal issues facing post secondary educators.

Richard E. Wilson
Vice President for Programs
American Association of
Community and Junior
Colleges

Preface

This volume continues a series of papers on legal issues of importance to college and university educators. It will also continue the format of *Legal Issues for Postsecondary Education: Briefing Papers I.* The papers are directed at laymen. To the extent possible, legal jargon is avoided. However, it should be noted that these papers are no substitute for legal counsel. In particular situations, the reader is advised to consult legal counsel.

The project from which these papers were produced was sponsored by the American Association of Community and Junior Colleges in cooperation with the National Association of College and University Attorneys and the National Association of College and University Business Officers. The Ford Foundation provided financial assistance. Many people played a part in the project. Their work is deeply appreciated. Of special mention are those people named in the introduction to the first volume.

Legal issues continue to play a growing part in the work of college and university administrators. It is hoped that these volumes will help administrators to become conversant with the general issues, and will aid them in deciding when to consult legal counsel.

All statements made and views expressed in these papers are solely the responsibility of their authors.

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Executive Assistant to the Chancellor
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Chapter 1

Employment, Evaluation, and Retention or Nonretention of Faculty and Staff

Robert D. Bickel and Louis W. Bender

This chapter contains a general discussion of the legal obligations and rights of institutions of higher education as employers. It also addresses the role of the institution's administrators in carrying out the personnel policies and procedures of the institution. The statutory and case law presented should serve as a basic guide to the college administrator concerned with the employment and evaluation of faculty and other staff. An understanding of the information in this chapter should provide the college administrator with a sound basis for interaction with legal counsel, and should enable one to present counsel with those facts which are important to the resolution of a particular problem in a manner favorable to the college or university.

The basic principles discussed, however, do not provide enough direction for the college administrator to deal with every personnel problem. The college administrator should consult counsel concerning the legal rights and responsibilities of the college or university in particular situations where there is ambiguity or uncertainty. It should be remembered that the primary obligation of the administrator is to bring to the attention of legal counsel all aspects of a situation which bear on the problem in question. This responsibility pertains in situations involving the development of policies or guidelines which will effectively define and implement the institution's legal rights and responsibilities with regard to the employment of personnel, as well as to those situations in which legal problems have arisen concerning personnel.

INSTITUTIONAL SAFEGUARDS

Central to personnel management is a defensible legal framework within which all professional personnel operate. Too many colleges and universities have been negligent in developing appropriate written policies related to employment, evaluation, and nonretention of faculty and staff. No administrator can be expected to function successfully in terms of the law, if appropriate policies and procedures do not exist. Similarly, no institution

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can be immune from court action if uniform and consistent application of those policies and procedures is not maintained.

In examining a particular employment situation, the college administrator should raise several questions which could determine the need to involve legal counsel:

1. Are certain relationships between the institution and its employees unclear either because of the absence of specific policies or the ambiguity of present policies?

2. Has there been a significant passage of time since the last review of current personnel policies and practices? (The absence of periodic review of personnel policies, especially as they relate to employees of public institutions of higher education, is critical, since many of the legal rights and responsibilities of such institutions and their employees have been only recently defined by the federal and state courts, and state and federal statutes, and because this body of law is constantly being further defined.)

3. Does the institution contemplate significant personnel action involving one or more employees which might result in a challenge by the employee or employees (or a representative of such employees, e.g., a union or other employee organizations) to the institution's decision?

4. Have new laws, rules, regulations, or policies of state level boards been developed which call for the development of new personnel policies or the amendment of existing personnel policies at the local level? (Each institution should monitor on a continuing basis new laws or the amendment of existing laws which alter the rights and responsibilities of the institution.)

5. Is the institution otherwise in doubt concerning its legal obligations in a particular situation where significant personnel action is contemplated?

If such questions arise, the college or university should seriously consider consultation with legal counsel. Generally, the development of institutional personnel practices and the resolution of significant contemplated personnel action which will affect the rights of academic and professional employees of the institution are matters important enough to call for the expenditure of time and resources required for involvement of legal counsel. Such an investment in legal advice at this stage may prevent an expensive and disruptive resolution of legal problems at a later point in time.[1]

CONTEXT OF CASE LAW

Caution must be conveyed concerning use of this chapter by the college or university administrator without understanding the context of case law. The vast body of statutory and case law applies differently to different institutions, may be of limited impact, and is constantly changing. These factors interface to preclude the definition of general legal principles iden-

tical or practical for, or applicable to, all institutions of higher education in every case which appears similar.

The law applies differently in many respects to public and private institutions. Some of the legal rights and responsibilities discussed apply uniquely to public institutions because they engage in state action;[2] other statutory or case law applies equally to both public and private institutions because both are covered by specific statutes, e.g., Title VII of the Civil Rights Act of 1964. Finally, the nature of the relationship between the public institution and its employees differs, in many respects significantly, from the relationship between the private institution and its employees. Specifically, public employees have many rights inherent in their status as employees of the state or other political subdivisions, whereas the employment relationship between the private institution and its employees is primarily one arising out of contract.

The impact of the law also varies depending upon the context of particular statutes, whether or not they are federal or state statutes, and depending upon the particular court adjudicating a legal contest between an institution and an individual employee or group of employees. Many federal statutes apply to both public and private institutions in all the states. On the other hand, state statutes apply only within a particular state and have no impact upon institutions in other states, except insofar as they may be found to be legally operating within or to have other relationships to the state in question. Of equal importance is the jurisdiction of the court which has rendered a particular legal decision. Decisions of the United States Supreme Court apply throughout the 50 states equally to all institutions finding themselves within the same situation as that posed by the case determined by the court. Decisions of lower federal and state courts have more limited jurisdictional impact, and, in most cases, do not apply to institutions in all 50 states. Decisions of the Federal Circuit Courts of Appeal apply only within the specific federal circuit and therefore impact directly upon only those institutions within the states included within a given circuit. Decisions of United States District Courts (federal trial courts) are binding within an individual district of a single state.

Similarly, decisions of a state supreme court are binding only within that state, and decisions of lower state courts are binding only within specific geographical and judicial districts within that state. Such decisions are not binding upon institutions located outside the state except as previously noted. Where decisions of courts are not binding outside the jurisdictional district or circuit of that court, they may nevertheless be persuasive in the determination of a case. The point is that the administrator, in reading cases which are not binding within the institution's jurisdiction, should recognize that they may or may not be determinative in defining the legal rights and obligations of the institution. It is, therefore, important that the college administrator not interpret specific case decisions or specific statutes cited in this chapter or elsewhere in legal materials as necessarily binding upon the institution or as otherwise constituting general legal principles applicable to the institution. A particular decision may, indeed, not be at all binding upon the institution but may be read only as instructive or as an indication of the possible or likely legal obligations of the institution.

Finally, the college administrator must be aware that the federal and state court cases discussed here or in other publications defining the legal rights and obligations of educational institutions, may be in various stages of appeal and, even if final, may at some later point in time be reversed, or otherwise modified in whole or in part. Any discussion of specific case law is necessarily dated within a relatively short period of time, although the general principles discussed in this paper and similar legal treatises remain constant enough to allow the administrator basic reliance upon the advice imparted. It is necessary, however, to recognize that the decisions cited may be decisions of lower federal or state courts which are now under appeal or may otherwise be subject to modification. Legal counsel discussing the institution's legal rights and obligations with its administrators is always alert to examine this body of case law to insure that precedent remains current.

SELECTION AND EVALUATION

One of the two crucial areas upon which courts have focused attention in personnel/institution relationships is the selection stage. The other crucial area represented by the termination stage will be treated in the next section.) The selection stage can be described as the time during which the institution determines to fill a position. Care must be taken to be sure that hiring requirements and position descriptions (criteria) are accurately advertised and meet equal employment opportunity, affirmative action, and other legal requirements, and that contractual agreements are scrupulously followed in a legally defensible manner. The selection practices followed in past years may have been characterized by various degrees of informality. Today, however, the selection process has become far more complex, requiring the administrator to be aware of the legal liability which awaits haphazard or discriminatory action.

The responsibilities of private and public institutions to guarantee equal employment opportunities are derived in part from different laws. State action—including employment practices—which results in the deprivation of civil rights guaranteed by the Fourteenth Amendment is proscribed by constitutional mandate and uniquely affects public community colleges, colleges, and universities. Similarly, portions of the Civil Rights Act, 42 U.S.C. Section 1981 *et seq.*, applies to action taken under color of state law, which deprives an individual of his or her civil rights. These sections have a unique impact upon those institutions which are public by definition or which enjoy sufficient entanglements with the state to support a finding of state action.[3]

The responsibilities of private institutions to fashion employment practices free of unlawful disparate impact are, on the other hand, derived primarily from specific federal statutes, *e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[4] The objective of federal legislation against employment discrimination was expressed by the United States Supreme Court in *Griggs v. Duke Power Company:*

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve *equality* of employment opportunities and remove barriers that have operated in

the past to favor an identifiable group of white employees over other employees.[5]

It is impossible to treat within any discussion of reasonable length each of those employment practices which has been analyzed by the various federal agencies or courts in enforcing the policies of the Constitution and the Congress related to equal employment opportunity. Various federal agencies and courts and state human relations or fair employment practices commissions examine employment practices ranging from tests required for various jobs to sick leave policies of public and private employers.

In auditing employment practices, the basic guideline to be applied by the institution is whether the practice or policy has a disparate impact upon members of the affected class as defined primarily by Higher Education Guidelines, promulgated on October 1, 1972, by the Department of Health, Education and Welfare. If such disparate impact is found, the institution should be prepared to demonstrate that the requirements of the practice or policy bear a rational relationship to the particular job affected by the requirements or the performance required of the employee.[6] Not all job requirements which have a disparate impact upon certain members of the affected class are *per se* discriminatory. Indeed, the employer may "lawfully discriminate" against certain members of the affected class in establishing a job requirement or qualification where necessary for successful performance in the position and which bears a rational relationship to the duties to be performed. The federal and state courts vest in the college or university wide discretion in defining criteria for identifying qualified applicants for employment or candidates for promotion or tenure, especially at professional levels. Repeatedly, in employment discrimination litigation, the federal courts have held that the exercise of judgment in the selection or evaluation of a professional, although involving an element of subjectivity, is valid if performance related and in the absence of a demonstration that such judgment is employed with a sex, race, or ethnic bias.[7] The test is virtually identical to that applied to any other challenge that action by the college or university constitutes an abridgment of basic constitutional rights. Indeed, much of the instructive holdings of the federal courts in suits alleging the deprivation of constitutional rights have come out of cases involving allegations of sex or race discrimination.

These decisions of the federal courts recognize the absolute necessity that any institution employing professional persons must be vested with substantial discretion in the establishing of standards for the selection and evaluation of such employees and must be able to exercise judgment in the application of these standards or criteria to the selection or evaluation of a particular professional. Although the college or university may not be able to continue to insist upon the "best qualified" or "most qualified" academic professional employee, or, in some instances, even upon the terminal degree requirement without risking noncompliance with affirmative action mandates under the executive orders, it may continue to insist upon certain standards in the areas of teaching, research, and service which must be met by an applicant for employment, or a candidate for promotion or tenure, with the likelihood that the federal courts would be supportive of the institution's right to determine such standards (and the

relationship between the standards and successful performance in the position to which the standards are applied).[8]

AFFIRMATIVE ACTION

Created by Executive Orders 11246 and 11375, affirmative action is a responsibility of covered employers and is implemented through regulations of the Department of Labor, 41 Code of Federal Regulations, Chapter 60, as defined in the Higher Education Guidelines promulgated under Executive Order 11246 by the United States Department of Health, Education, and Welfare.[9] Affirmative action requires a covered employer—*i.e.*, a nonconstruction contracting agency of the government or contractor or subcontractor who performs under government contracts, as defined in Title 41 of the Federal Regulations—to do more than ensure employment neutrality with regard to race, color, sex, religion, age, or national origin. Affirmative action requires the employer to make additional efforts for a temporary period to recruit, employ, and promote qualified members of groups formerly excluded from employment, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer. (See the chapter written by Sensenbrenner and Richardson in Volume I of this series for further discussion of Executive Order 11246 and Title VII of the Civil Rights Act of 1964.)

The critical element in the establishment and implementation of an affirmative action program—the requirement which most often leads to allegations of preferential treatment and reverse discrimination—is that of establishing goals and timetables[10] for the recruiting, hiring, and utilization of qualified members of groups formerly excluded from employment generally or in certain job categories—*i.e.*, corrective action.[11] Those institutions strongly committed to serious programs of affirmative action have found that this requirement is easy to write but difficult to implement. Employees within and those persons outside the institution who are opposed to or who perceive themselves to be threatened by a strong affirmative action program may seize upon the term "qualified" and sound the alarm that institutional and educational quality will deteriorate unless the institution continues to select those most qualified for appointment by *traditional* standards and criteria.

The institution committed to an affirmative action program to correct the historical underutilization of minorities and women in its academic professional work force, and to introduce into that work force persons representative of a wide variety of backgrounds and skills, should be free to establish flexible standards and criteria for selection and advancement which ensure these results.[12]

It appears to be the position of the Office of Civil Rights that institutions which strongly encourage the candidacy of "qualified" women and minorities and which employ temporary numerical goals and timetables for increasing the utilization of affected class persons previously excluded from or underutilized in certain job categories are in compliance with the Higher Education Guidelines, so long as the recruitment, hiring, and employment process does not select unqualified applicants over qualified applicants, or exclude non-affected class persons from employment

opportunities because of race, or sex, or employ other race or sex oriented criteria as the sole criteria for determining employment opportunity.

Repeatedly in employment discrimination litigation, the federal courts have held that the exercise of judgment in the selection or evaluation of a professional, although involving an element of subjectivity, is not invalid in the absence of a demonstration that such judgment is employed with a sex, race, or ethnic bias. The reasoning of these cases appears to be generally as applicable to affirmative action efforts as it is to efforts of the employer to provide equal employment opportunity.[13]

REVERSE DISCRIMINATION

Obviously, the primary cry against programs of affirmative action, especially in times of economic austerity, is that they establish discrimination in reverse.[14] Here, definitive precedent, binding in all jurisdictions, does not exist. Such precedent might exist had the United States Supreme Court decided *DeFunis v. Odegaard.*[15] Clearly, the impact of the preferential student admissions program challenged in *DeFunis* is little different in impact from aggressive programs of affirmative action in employment. In upholding the University of Washington Law School Minority Admissions Program, the Supreme Court of Washington held that a public university may grant special consideration to ethnic and racial minority applicants in its admissions procedures without violating the Equal Protection Clause of the Fourteenth Amendment. The Court relied heavily upon its interpretation of *Brown v. Board of Education,*[16] which the court held does not prohibit all racial classifications but rather only those which are invidious and which stigmatize a racial group. The Court determined that subsequent decisions of the United States Supreme Court have made it clear that in some circumstances racial criteria may be used—and indeed in some instances must be used—by public educational institutions in bringing about racial balance.[17]

The Court held that preferential programs such as the one in question could be consistent with constitutional mandates only where the school was able to carry the burden of proving that use of race as a factor in admissions was necessary to accomplish a compelling state interest. However, the Court found this compelling state interest in the educational interest of the state in producing a racially balanced student body and increasing participation in the legal profession by racial and ethnic groups which have historically been denied access to the legal profession and which are grossly under-represented within the legal community. Finding this compelling state interest, the Court held that the preferential admissions program was consistent with the Constitution so long as admissions criteria were not arbitrary and capricious. The Court held that the criteria included the identification of applicants with potential for successful performance in law school and looked toward selection of those who would make significant contributions to the school and the community at large. In language analogous to that used by the courts in the employment discrimination cases, the Court specifically held that the departure from the predicted first year average based upon test scores and grade point average and the utilization of judgmental factors, including the weighting of ad-

missions criteria differently for different applicants, does not, *per se*, make the action arbitrary and capricious.[18]

Strong dissenters argued primarily that in *Brown* and similar cases cited by the majority, the issues involved the providing of equal educational opportunity and resulted in no denial of educational opportunity to either white or black students. The dissenters distinguished the facts in *DeFunis* on the ground that the minority admissions program established by the law school resulted in a deprivation of educational opportunity to the plaintiff and other white males rejected by the school. A similar argument may be used to attack an affirmative action program which establishes and applies flexible criteria in the selection and evaluation of academic and other professionals. However, it should be noted that the thrust of the Executive Orders and of the regulations promulgated by the Department of Health, Education, and Welfare governing affirmative action programs clearly establish a preference in the selection of employees.

MOOT CASE

Unfortunately, the United States Supreme Court dismissed *DeFunis* on appeal as moot. Had the United States Supreme Court reversed the decision of the Washington Supreme Court in *DeFunis*, certainly the concept of affirmative action would have been severely limited and the effect of many affirmative action programs slowed.[19] However, even a disapproval of the preferential program presented by *DeFunis* would not necessarily prevent the utilization of such standards and criteria for the selection of academic and other professionals, as are herein advanced. Had the Supreme Court chosen to fault the University of Washington's preferential admissions program, its criticism might have been directed toward the law school's application of different criteria to segregated classes of applicants. The court might well require the application of identical criteria to all applicants, although allowing and perhaps requiring that such criteria be designed so as to insure consideration of any applicant who might possess qualities predictive of successful performance. Such criteria could, under these circumstances, include the identification of unique skills and backgrounds which predict success in performance based upon the university's goals and objectives. And, importantly, the application of such criteria might well tend to select disadvantaged white or black, male or female applicants or candidates for advancement.

The utilization of standards and criteria for the selection and advancement of academic and other professionals is not a program of quota hiring or advancement. Indeed, such programs are of questionable legality. Disapproval of rigid quotas has already been indicated by the United States Supreme Court in *Griggs v. Duke Power Company:*

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial,

> arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[20]

The guidelines promulgated by the Department of Health, Education, and Welfare, pursuant to Executive Orders 11246 and 11375, emphasize that while goals are required, quotas are neither required nor permitted by the Executive Order. When used correctly, goals are an indicator of probable compliance and achievement, not a rigid or exclusive measure of performance.[21]

The viability of affirmative action programs may be seriously affected by economic austerity. In *Jersey Central Power and Light Co. v. Local Union 327, etc. of I.B.E.W.*, 508 F.2d 687 (3d Cir. 1975) and *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F. 2d 1309 (7th Cir. 1974),[22] the Third and Seventh Circuit Courts of Appeal have held that employment (plantwide) seniority systems embodying the "last hired first fired" principle of seniority is not of itself racially discriminatory nor does it perpetuate prior racial discrimination in violation of Title VII of the Civil Rights Act. Although the cases do not speak to the mandates of Executive Orders 11246 and 11375,[23] there is *dicta* in *Jersey Central* indicating that any departure from an established system of plantwide seniority may constitute preferential treatment in favor of minorities and women as opposed to remedial action, in violation of Title VII.[24]

Such holdings could make it difficult for a college or university in a period of economic austerity to lay off tenured faculty, other professionals, or permanent career staff in a manner which preserved the numerical gains in the employment of affected class persons achieved under the institution's affirmative action program, where the institution has developed a policy under which seniority is a critical factor.[25] A final resolution by the United States Supreme Court of the legality of employment seniority systems could substantially define the limits of temporary preferential treatment in employment as a measure of corrective action to remedy historical exclusion of minorities and women.

LIABILITY FOR DISCRIMINATION

Liability for Employment Discrimination: Generally, plaintiffs in employment discrimination litigation seek both injunctive and monetary relief. Injunctive relief often requires only that the institution cease the employment practice or policy found to be discriminatory under constitutional or statutory mandates. It may require appropriate affirmative action which may include the hiring of an applicant, reinstatement of an employee, promotion, or similar corrective action by the employer. In addition, laws prohibiting employment discrimination may require or allow for awarding of monetary relief, including back pay and/or damages.

Public employers, including public community colleges, enjoy, in many states, an immunity from such monetary liability not enjoyed by their private sector counterparts. The decision of the United States Supreme Court in *Edelman v. Jordan*, 415 U.S. 651, (1974) arguably establishes, in the absence of clear and specific waiver by the state, an immunity of state agencies, including many public colleges and universities,

under the Eleventh Amendment to the United States Constitution,[26] from liability for retroactive monetary relief, payable out of the state's treasury, to individual or class plaintiffs seeking such relief as compensation for discriminatory employment practices affecting them as individuals. Most public institutions involved in employment discrimination litigation have maintained that *Edelman v. Jordan* bars not only the award of damages and back pay but any retroactive monetary relief against the state, or payable from the state's treasury, including attorney's fees. At least some federal courts have considered certain aspects of monetary relief to be an integral part of the equitable remedy of injunctive reinstatement. *Edelman* appears to reaffirm that where the action is in essence one for the recovery of money, the state is the real party in interest, even though individual state officials are nominal defendants, and, further, that any suit against the state is barred to the extent that private parties seek to impose upon the state a retroactive liability which must be paid from public funds in the state treasury. The question of whether the Eleventh Amendment precludes the award of retroactive back pay specifically referenced as a remedy which a federal district court may award under the provisions of Title VII has yet to be squarely presented to the United States Supreme Court. In *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975) the Supreme Court held that, in the absence of specific statutory authority, a federal court could not award attorney's fees to successful litigants in a suit alleging the violation of federal environmental and mineral leasing statutes.[27] This case is not, however, dispositive of the state's immunity from back pay awards under the Eleventh Amendment to the United States Constitution because attorney's fees may be characterized by the courts as different from retroactive monetary relief,[28] and because *Aleyska* did not squarely raise the question of immunity.

Some states may enjoy a similar immunity under state law from liability for actions arising in tort, thus preventing civil suits against the state, sounding in tort, and arising from the performance of responsibilities by state officers acting within the scope of their authority. However, the immunity of the state under state law and under the Eleventh Amendment may be waived by the state. Generally, statutes waiving the state's immunity from suit sounding in tort, being in derogation of sovereignty, are to be strictly construed, especially where it is asserted that such liability is waived under federal statutes, thus allowing suits against the state in federal court. Where there is no clear intent in a waiver of immunity statute to subject a state agency to actions in federal court, such suits may normally not be maintained.[29]

The matter of personal liability of a public school official presents a different question. The recent decision of the United States Supreme Court in *Wood v. Strickland,* (421 U.S. 921 (1975), establishes a new test for determining whether a state officer may be held personally liable for monetary damages as a result of action taken by that officer which results in the deprivation of civil rights. The decision in *Strickland* should be studied in its entirety since any reading of portions of its language, out of context, might create a perception that public officials are likely to be liable for monetary damages whenever they act in a manner which results in the deprivation of civil rights.

Prior to *Strickland*, it was unlikely that a public institutional official could be held personally liable for actions which deprived individual civil rights absent proof that such action was effected with the malicious intention to cause a deprivation of constitutional rights or other injury to the individual. *Strickland* reinforced that there must be an immunity afforded public officials so that they understand that action taken in the good faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity. However, *Strickland* limited this concept of immunity in holding that, in the specific context of school discipline, a public official "is not immune from liability for damages under Section 1983 [of the Civil Rights Act] if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."[30] The court held, however, that a compensatory award would be appropriate only if the school official acted with such an impermissible motivation or with such disregard of the individual's clearly established constitutional rights that his actions cannot reasonably be characterized as being in good faith.

Imposing this test, the Supreme Court reversed a judgment of monetary relief against individual school officials holding that the decision of the court of appeals was based upon an erroneous construction of the school's regulation in question and holding that there was, contrary to the holding of the court of appeals, evidence supporting the charge against the individual students adjudicated by the school board.

Clearly, the holding in *Strickland* may be applied outside the area of student discipline and may be invoked in the case of unlawful employment action by an employer taken in bad faith under the *Strickland* test. In this context, *Strickland* dictates that where a public college or university administrator has any doubt as to whether an employment policy, practice, or proposed action violates the civil rights of affected employees under constitutional mandates or federal or state employment statutes, counsel should be consulted by the administrator in order that the administrator not take any action clearly violative of settled constitutional or statutory provisions and about which the administrator should be aware.[31]

Strickland also advises that administrators document reasons for effecting specific employment action or practices, (*e.g.*, individual employee performance), in order that action taken against an employee not be taken arbitrarily or capriciously or absent a determination of facts and circumstances which provide a rational basis for the action taken.

NONRETENTION AND DISMISSAL

Generally, the concept of tenure is peculiar to public employment. The obligation of the private employer regarding the retention of his or her employees is generally defined within the contract of employment between the institution and the individual employee. A collective bargaining agreement applicable to a total bargaining unit may confer certain rights upon the entire group of which the bargaining unit is composed. In any event,

disputes concerning reasons for nonretention of an employee or the procedures utilized to effect the separation of an employee from employment will be determined by an application of the contract provisions. Private junior colleges, colleges, and universities should therefore insure that contracts of employment are specific and contain reference to all policies, procedures, and regulations which govern employment at the college or university. Generally, no rights, including seniority or tenure rights, will be implied where the employment contract and the policies, rules and regulations it incorporates by reference explicitly define conditions and procedures under which an employee obtains these privileges.

Certain responsibilities of the private sector employer are, however, regulated by federal statutory law and executive order and may not be contradicted by any contract, including a collective bargaining agreement. Primary among these responsibilities are those relating to equal employment opportunity and affirmative action.[32]

Decisions by public community colleges, colleges, and universities to retain or separate their employees are affected by obligations of both contractual and constitutional or statutory origin. The public employee, including the employee of a public college or university, possesses certain substantive and procedural rights which may not be denied or abridged by any act of the college or university in affecting his or her employment. The nature of this responsibility to the employee results from the public character of the institution. Actions by officers of state supported colleges and universities against individuals is state action, and it is state action which is regulated by the United States Constitution (primarily through the Fourteenth Amendment) and federal civil rights statutes. It is the public institution that is uniquely liable for the termination of any employee solely for the exercise of First Amendment privileges because the constitutional impermissibility of such action is peculiar to the public institution, as an arm of the state. This distinction between the public and private institution must be understood by public community college and college and university administrators if they are to fully appreciate their unique responsibilities. Since their action represents action of the state against an individual, they are held to a higher accountability for the protection of those rights guaranteed by the United States Constitution and the federal civil rights statutes.

Tenured public employees may not generally be dismissed from their employment in the absence of just cause and there must be provision for a hearing at which the employee has the opportunity to prove the stated reasons for dismissal are unjustified or otherwise impermissible. This doctrine was applied to academic employees of public postsecondary educational institutions in 1956 when the United States Supreme Court held that a tenured faculty member could not be summarily dismissed from employment without notice of the reasons for such dismissal and the opportunity for hearing.[33] This right embodies concepts of both substantive and procedural due process. First, it is required that the permanent or tenured public employee may not be summarily dismissed without reason. Rather, specific reasons related to that employee's performance or fitness for employment must exist to substantiate dismissal. Further, procedural due process requirements mandate a hearing at which the employee may challenge the sufficiency of those reasons.

As the Court noted in *Slochower*,[34] this is not to say that the employee has a constitutional right to employment. Indeed, the public institution continues to be vested with broad discretion in the selection, evaluation, and nonretention of its employees and may demonstrate that the employee's performance or fitness for employment warrants dismissal. Although dismissal is generally based upon unsatisfactory performance of job duties, the United States Supreme Court specifically noted in *Slochower* that continued employment may be inconsistent with other real interests of the state. These interests may, in many jurisdictions, include concern for institutional harmony, the ability of the employee to get along with others, and the concern for conduct by employees which perpetuates public confidence in the institution.[35]

Instances of teacher outspokenness, when considered as a basis for dismissal, must undergo the most careful analysis. Although it is not generally required that a teacher's action in this regard lead to actual physical disruption of the operation of the institution before any action is taken, it is suggested that the speech activity of a teacher must evidence a substantial departure from civility and professional standards.[36]

NON-RENEWAL OF NON-TENURED PERSONNEL

Since the decisions of the United States Supreme Court in *Board of Regents of State Colleges v. Roth*,[37] and *Perry v. Sindermann*,[38] it has been firmly established in most federal circuits that a nontenured public employee, including a nontenured professor, has no constitutional right to a statement of reasons or a plenary hearing on a public college or university's decision not to renew his or her employment contract. The public institution may generally decline to rehire a nonpermanent employee for any reason, except one that is constitutionally impermissible, such as retaliation for the exercise of permissible speech activities, or reasons which are related solely to consideration of the employee's race, sex, or ethnic origin.[39]

Where a faculty member asserts that the decision not to renew his or her employment contract is based upon constitutionally impermissible reasons such as the exercise of speech activities, and such allegations are supported by specific factual evidence, the public college must provide a hearing at which the faculty member has an opportunity to prove that such reasons were the sole reasons for the decision not to renew his or her contract of employment. Certainly, the naked assertion that the nonrenewal is an infringement of basic constitutional rights does not support a demand for a plenary hearing. However, where specific factual assertions are made, which, if proven, would substantiate an allegation that a decision not to renew the contract of employment of the affected faculty member was in retaliation for First Amendment or other rights guaranteed by the Federal Constitution or in deprivation of federal civil rights, the faculty member should have an opportunity to prove such reasons were the sole motivating causes for the decision. If such a hearing is offered, the result may well be to require the public institution to produce and document the reasons for the decision not to renew the employee's contract.

This result appears contradictory to the earlier indication that under the doctrine outlined in *Roth* and *Sindermann*, the college or university is

not obliged to provide reasons for nonrenewal. The legal mandates are not contradictory but rather depend upon the success of the faculty member in documenting constitutionally impermissible reasons which might have been the basis for the decision not to renew his or her employment. Where the nontenured employee is able to prove that he or she engaged in constitutionally protected activity, and is further able to demonstrate that it may be inferred that such activity was considered by college or university administrators in deciding not to renew his or her employment, this inference may make out a *prima facie* case that the nonrenewal is constitutionally impermissible. It is at this juncture that the institution, which is not otherwise obligated to provide reasons for the decision, must present some evidence to overcome the *prima facie* case that the decision was based solely upon constitutionally impermissible reasons. The practical result of this shifting of the burden of proof is to require the college or university to offer some evidence that the reasons for the nonrenewal were related to reasons other than those asserted by the employee.

Where nondiscriminatory grounds are shown to have been the basis of an institution's actions to separate an employee, that decision should be affirmed even where allegations of the denial of constitutional rights are made for the showing of valid nondiscriminatory grounds for the separation avoids the allegation of the infringement of constitutional rights.[40] Importantly, the issue in cases dealing with alleged nonrenewal of employment in retaliation for the exercise of constitutional rights is not whether the reasons upon which such a decision was based would have supported a dismissal of the employee for cause. Nor is it the function of a court, hearing officer, or university review panel to conduct a *de novo* review of the employee's accomplishments for the purpose of recommending renewal, promotion, or tenure or to otherwise substitute its judgment for the judgment of those in a particular discipline with regard to the matter. Rather, the issue is whether the decision not to recommend promotion, tenure, or contract renewal was made in retaliation for the exercise by the employee of his or her federally protected rights or whether the decision was otherwise arbitrary and capricious, *i.e.*, unrelated to valid considerations of such factors as the employee's performance or the needs of the employer,[41] or the institution's regulations governing employment.

THE "LIBERTY" INTEREST

In *Board of Regents of State Colleges v. Roth*, the United States Supreme Court impliedly held that where a public institution bases an employment decision upon charges affecting an employee's good name, reputation, honor, or integrity—*e.g.*, personal dishonesty or immorality—such circumstances might implicate "liberty" interests of that employee under the Fourteenth Amendment to the United States Constitution.[42] This holding has little impact upon a decision not to renew the employment of a nontenured public employee where no reasons are asserted which comment upon the personal character of the employee. In this regard, the Supreme Court held in *Roth* that "it stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another".[43] Moreover, where decisions not to promote, give tenure, or rehire are based upon performance related

reasons or the professional qualifications of the employee and do not charge him or her with personal dishonesty, immorality, or other personal misconduct, there is no stigma imposed upon the employee sufficient to affect his or her "liberty" interests under the Constitution.[44]

A review of the case law suggests that where possible, college or university procedures should not provide for the public or private statement of reasons for decisions against promotion, tenure, or rehire, unless reasons are requested, in writing, by the affected employee.[45] Where reasons are provided, it is advisable that they be provided to the affected employee in a direct, and preferably confidential communication. Such reasons should, insofar as possible, relate only to the professional performance of the employee and needs of the college although, as is discussed herein, such grounds may include personal conduct of an unprofessional nature by the employee.[46] Finally, such reasons should not be published by the institution but should be disseminated only to individuals within the institution who must be informed of the personnel action and otherwise disclosed only in proper forums, such as at a hearing requested by the faculty member. Where the faculty member requests reasons or a hearing, or otherwise publishes reasons related to decisions against his or her promotion, tenure, or rehire, it is unlikely that courts will hear any argument that a stigma has been imposed upon the faculty member's reputation by action of the college.

FERGUSON CASE

If the affected employee is offered a hearing on the matter of the denial of promotion, tenure, or contract renewal, such a hearing, if conducted in accordance with fundamental due process requirements such as those outlined in *Ferguson v. Thomas*[47], will likely dispel or moot any claim of deprivation of liberty. At most, the institution's obligation in cases questioning the personal honor or integrity of an employee is to offer a hearing at which that employee has the right to clear his good name and respond to the charges of personal misconduct.

The primary question presented to the United States Supreme Court in *Roth* and *Sindermann* was whether, under certain circumstances, a public employee may possess a property interest of constitutional magnitude—a *"de facto* tenure"—which may not be deprived without procedural due process which guarantees a statement of the reasons for the action by the college and a hearing at which the affected employee may prove the insufficiency of the reasons. The question was presented to the Supreme Court on writs of certiorari to the United States Court of Appeals for the Seventh Circuit *(Roth)* and the United States Court of Appeals for the Fifth Circuit *(Sindermann)*. The Fifth Circuit had decided the question at least once prior to its decision in *Sindermann* in a case filed by Dr. William C. Ferguson against Prairie View A&M College, alleging that the decision of the college not to renew his contract of employment violated his rights of expression and association and his right to procedural due process under the First and Fourteenth Amendments to the United States Constitution.[48]

In *Ferguson*, the district court noted that no Prairie View A&M College instructor had tenure in the technical sense of that term. Contracts of

employment were made annually and decisions to renew employment were based upon recommendations of senior faculty members, the dean, and the president of the college. The court also noted, however, that the applicable rules and regulations of the Texas A&M University System provided that "officials, teachers, and other employees shall be subject to dismissal for cause at any time by the Board of Directors or the executive in charge, subject to review by the Chancellor . . . and the confirmation of the Board of Directors."[49] Reversing a decision by the district court that Dr. Ferguson was not entitled to a plenary hearing on the matter of his nonrenewal, the Fifth Circuit Court of Appeals held that the college and its directors conceded that under prevailing practices, a decision not to offer a teacher a renewal contract of employment required a showing of cause. This treatment, the court stated, was sufficient to create for Dr. Ferguson "an expectancy of reemployment that required that his termination be accomplished under procedures which would afford him the fundamentals of due process."[50] The court noted that Dr. Ferguson had neither tenure in the formal sense nor any right to additional employment. However, reviewing its decision in *Pred v. Board of Public Instruction,*[51] and *Greene v. Howard University,*[52] the court held that a college can create an obligation between itself and an instructor where none might otherwise exist if it adopts regulations or standards which create an expectation of reemployment. In sum, the Fifth Circuit held that although Dr. Ferguson had no express contract of reemployment and was not tenured in the formal sense, the rules and regulations adopted by the board of directors of the Texas A&M System created an expectation of reemployment in providing that employees were subject to dismissal only for cause.

In deciding the companion cases of *Board of Regents of State Colleges v. Roth* and *Perry v. Sindermann,* the United States Supreme Court rejected the Fifth Circuit's test of "expectancy of reemployment" but supported the extension of basic federal constitutional guarantees to nontenured members of the faculty of public educational institutions where, as in *Ferguson,* the regulations of a college or university on their face, or as applied, create an obligation in the college or university to offer employment on a continuing basis, absent just cause for dismissal. There is no doubt that in *Roth,* the Supreme Court reaffirmed the right of a public institution to hire faculty members on a probationary basis and concluded that decisions not to reemploy a probationary faculty member may be based upon any reason or upon no reason at all—other than constitutionally impermissible reasons. However, the Court held that where a nontenured faculty member can demonstrate that he or she has a "property interest" in continued employment, despite the lack of tenure or a formal contract, any notice of nonrenewal must be accompanied by a statement of the reasons therefore and a hearing at which the affected faculty member must be afforded a reasonable opportunity to argue the matter.

In *Roth,* the Supreme Court found no such property interest in reemployment. Specifically rejecting the Fifth Circuit's holding in *Ferguson,* that such an interest is created when a faculty member has a unilateral expectation of employment, the Supreme Court held that, in order to be entitled to Fourteenth Amendment due process guarantees, a nontenured faculty member must have a legitimate claim to reemployment, created and defined by rules or understandings that secure certain benefits and

support claims of entitlement to those benefits. Chief Justice Burger stated in his concurring opinion in the companion cases that the Court actually held only that a state employed teacher who has a right to reemployment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for the nonrenewal of his or her contract. The Court held that Roth demonstrated no such contract. Roth's letter of appointment specifically provided that his employment was to terminate on June 30. There were no provisions for contract renewal, absent "sufficient cause." In fact, as the Court noted, the letter of appointment made no provision for renewal. Nor, unlike in *Ferguson* and *Sindermann*, was there any state statute or university regulation creating any express or implied agreement to reemploy Roth on a continuing basis or to effect the nonrenewal of his contract only for cause. Under these circumstances, the Court held that Roth was not entitled either to reasons for the decision not to renew his employment or a hearing.

PERRY V. SINDERMANN

In the companion case of *Perry v. Sindermann*, the Court was afforded the opportunity to apply the principles enunciated in *Roth* to a fact situation involving rules or understandings which support the claim of a nontenured faculty member of entitlement to reemployment.[53] Sindermann's employment was governed by a policy paper adopted by the coordinating board of the Texas College and University System, which provided that:

> Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures to due process . . . . Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education.[54]

Further, the official faculty guide of Odessa Junior College where he was employed contained the following statement:

> Teacher Tenure: Odessa College has no tenure system. The administration of the college wishes the faculty member to feel that *he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his* co-workers and his supervisors, and as long as he is happy in his *work*.[55] (Emphasis added).

In May 1969, Sindermann was informed that his contract would not be renewed for the 1969-70 academic year. Sindermann was provided with no statement of reasons for the nonrenewal of his contract and was afforded no opportunity for a hearing to challenge the decision. Reversing the decision of the United States District Court granting summary judgment for the college, the Fifth Circuit held that, despite Sindermann's lack of tenure in the formal sense, the failure to allow him an opportunity for a hearing violated his right of procedural due process under the Fourteenth Amend-

ment if he could demonstrate that he had "an expectancy of reemployment."

Applying the principles expressed in *Roth,* the Supreme Court, again rejecting any unilateral expectation of employment theory, held that Sindermann's allegations did raise a genuine issue as to his interest in continuing employment at Odessa Junior College. Specifically, the Court held that the coordinating board and college guidelines supported Sindermann's argument that he had *de facto* tenure, as an employee of the Texas College and University System and of Odessa Junior College. The Court held that:

> A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing . . . A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in re-employment. For example, the law of contracts in most, if not all jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.' . . .
>
> We disagree with the Court of Appeals insofar as it held that a mere subjective 'expectancy' is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimary of his claim of such entitlement in light of 'the policies and practices of the institution.'[56]

Since the decisions of the United States Supreme Court in *Roth* and *Sindermann,* the Federal Courts have been generally reluctant to find any "property interest in continued employment" where a nonpermanent member of the college faculty or staff is employed under a contract which clearly indicates the beginning and the ending dates of the annual appointment and indicates that the appointment may be renewed only by mutual agreement of both parties—and in absence of regulations which require reasons for the nonrenewal of an appointment.[57]

GENERAL GUIDELINES

A college or university should be able to maintain its position of contract flexibility with nonpermanent faculty and staff employees if it adheres to the following general guidelines:

1. The nontenured appointment contract should be in the form of an offer of employment which must be accepted by the faculty or staff member;
2. The agreement should not be effective until executed by the appropriate officials of the college or university and the prospective faculty or staff appointee;
3. The contract should specifically indicate the beginning and the ending dates of the appointment;

4. The agreement should preferably indicate that the employment or appointment may be renewed only by mutual written agreement of both parties and that no college or university official except those whose signatures appear on the agreement can make any offer of appointment;

5. The contract should indicate that the appointment is nontenured and may specify the conditions under which the appointee is eligible for tenure (*e.g.*, whether the employee may be awarded tenure at the rank appointed; whether time in the appointed position may be credited toward eligibility for tenure);

6. Any special terms or conditions of employment such as the holding of department chairperson status, should be stated along with a clear indication whether and in what manner the special terms and conditions alter the nontenured status of the employee's appointment (in tenured contracts, it may be advisable to specifically reference appointments to the position of department chairperson or similar administrative responsibilities and to note that such positions are nontenured although the faculty position itself is a tenured appointment.)

The college or university should carefully review its policies, rules, and regulations relative to the eligibility for and the granting of tenure to ensure that these policies could not be interpreted to guarantee nontenured employees continued employment, absent just cause for dismissal. It is preferable that such policies, rules and regulations not mandate, in any respect, the expression by the college or university of reasons for its decision not to renew the appointment of a nonpermanent member of the faculty or staff of the institution. If such reasons are to be mandated in the interest of institutional-employee relations, they should be mandated only if requested in writing by the affected employee. Such a policy does not preclude or discourage appropriate administrative and academic officials within the institution from undertaking informally to confer with the employee, prior to and after the decision not to renew his or her appointment, in an effort to counsel the employee regarding his or her situation, possible professional relocation, and other matters relevant to the institution's decision not to renew the appointment.

The importance of a review of the institution's policies concerning nonrenewal of nontenured appointments cannot be overemphasized. As the Fifth Circuit indicated in *Ferguson*, when published rules and regulations establish a particular statutory procedure for the termination of a teacher's employment, they may add to those safeguards required by constitutional mandates. If they do, such regulations must also be followed.[58]

ADMINISTRATIVE HEARING

The Supreme Court did not dictate in *Roth* or *Sindermann* the forum for the adjudication of an allegation by a faculty member that a constitutionally protected "liberty" or "property" interest is being deprived absent due process, or the allegation that a decision regarding his or her employment status was in retaliation for constitutionally protected rights.

The Court held only that proof by a faculty member of a legitimate property interest in reemployment by the institution—*i.e.*, an express or implied contract of reemployment—would "obligate college officials to grant a hearing at his request where he could be informed of the grounds for his nonretention and challege their sufficiency."[59] Indeed, the opinions of the Court implied, and the concurring opinion of Chief Justice Burger expressly stated, that whether a particular teacher employed by the state has any right to an administrative hearing hinges on the question of state contract law (under which the existence of an express or implied contract would be decided). Read as such, the opinion supports a conclusion that the institution could defer to a state court the hearing on the existence of a contract prior to any offer to state reasons for a decision not to renew an appointment or to offer a hearing to allow the faculty member to challenge such reasons. The Court did, however, encourage the institution to determine these questions in an internal administrative hearing. This was emphasized by Justice Douglas in his dissent in *Roth*, where he quoted from the Court of Appeal's opinion in *Sindermann:*

> School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence, and school policy, which so frequently must be balanced in reaching a proper determination.[60]

In disposing of the question whether such faculty tribunals are capable of hearing questions involving principles of constitutional law, the Fifth Circuit held in *Ferguson:*

> Federal court hearings in cases of this type should be limited in the first instance to the question of whether or not federal rights have been violated in the procedure followed by the academic agency in processing the plaintiff's grievance. If a procedural deficit appears, the matter should, at that point, be remanded to the institution for its compliance with minimum federal or supplementary academically created standards. If the instructor challenges his termination on grounds that his constitutional rights have been infringed, a decision of that claim may and should be avoided if valid non-discriminatory grounds are shown to have been the basis of the institution's action.[61]

Strong support for the requirement to use every institutional remedy possible is demonstrated by the Ninth Circuit's decision in *Jablon v. Trustees of California State Colleges.*[62] The court affirmed the district court's dismissal of the claim of a nontenured faculty member that he was not retained because of his political beliefs and union membership, on the ground that the faculty member had failed to raise the First Amendment issue at the college administrative hearing considering his grievance. In those circumstances where the institution finds it appropriate to provide an administrative hearing the following additional considerations are relevant:

1. Pursuant to the holdings in *Roth* and *Ferguson*, the College or university should strongly consider utilizing a tribunal composed at least

in part of faculty members since they possess the academic expertise necessary to resolve problems relating to the professional evaluation of academic employees.

2. The college or university may consider utilizing the services of a duly qualified hearing officer, admitted to the practice of law, to advise the panel on proffers of proof, admissibility of evidence, and other procedural matters.

3. The faculty member should receive appropriate notice of the time and place of any hearing, the names of witnesses, and the nature of testimony to be submitted to the institution and should be accorded a meaningful opportunity to present and prove his or her allegations.

4. Representation of the college or university through counsel should be limited to those situations in which the faculty member is represented by counsel.

5. Proofs should be limited to only those concerns which are relevant in the context of the decision not to rehire, *e.g.*, whether the action of the institution was in retaliation for First Amendment activity. As noted earlier, except in those cases involving dismissal for cause, it is not the function of the hearing panel to conduct a *de novo* evaluation of the faculty member for the purpose of determining whether he or she should be retained, promoted, or tenured.

6. A verbatim record of the hearing, whether by court stenographer or electronic recording device, should be made and preserved.

FINANCIAL EXIGENCY

The most recently developed body of case law concerning the legal rights and responsibilities of institutions of higher education is related to termination of contracts, especially of tenured faculty, for reasons of financial exigency. The few court decisions rendered to date unfortunately reflect significant conflict of opinion among the courts in various jurisdictions concerning both the definition of financial exigency itself and the obligations of the institutions once financial exigency is demonstrated. Several excellent articles have recently been written on the subject of the rights and responsibilities in this regard.[63]

Where the determination of financial exigency is related to a specific policy or regulation of the institution which defines the term "financial exigency", or defines financial exigency as a basis for contract termination, the institution must observe its own definition and must be aware of any obligation created by its policies or regulations for the consideration of specific alternatives other than contract termination. In other words, the college or university may be bound by its own limitations upon the definition of financial exigency. The policies of Bloomfield College at the time of the Bloomfield College case provide an example.

Bloomfield College, in implementing a program of economic retrenchment, notified 13 members of its tenured faculty that their contracts were to be terminated. The institution also informed every faculty member

that on or before June 30, 1973, all 1973-74 contracts were to be one-year terminal contracts. On or about the time of the layoffs, Bloomfield College also took action to employ 12 new faculty members for teaching responsibilities which, the college alleged, and continues to allege on appeal, could not be performed by any of the 13 professors subject to layoffs.[64] The court heard extensive testimony documenting the assets and liabilities of Bloomfield College, its cash and other operating deficits, its cash flow problems, its declining enrollment, and the decisions of the institution relative to the possible disposition of substantial real estate holdings.

Initially, the trial court appeared to assume the posture that it should not substitute its judgment for that of the trustees of the college to weigh the wisdom of their action, to modify wayward or imprudent judgments in their formulation of educational or financial policy, or to decide whether the survival of the institution remains "possible" by the choice of other courses of action. However, the following findings by the court significantly supplemented this definition of the college's responsibility:

1. The hiring of 12 new faculty members between June 21 and September 30, 1973 (the period during which the action complained to took place) was not seen as justified by existing policies of the college. The court found the explanation that the newcomers were brought in to meet demands of a new modified curriculum to be unacceptable.

2. The court held that the rejection by the college administration of other remedial measures such as across-the-board salary reductions for all faculty members or the reduction of faculty size by non-renewal of nontenured contracts, complemented by the reduction of all remaining tenured contracts to one-year terminal contracts, confirmed the court's impression that the administration's primary objective was the abolishing of tenure at Bloomfield College and not the alleviation of economic exigency, notwithstanding substantial testimony presented at the trial of decreasing enrollments, serious cash flow and operating deficit problems, and other strong indications of financial instability.

3. Perhaps most important, and of greatest question, was the court's implied holding that measures which would supply immediate liquidity must be exhausted as a condition precedent to faculty layoffs on the basis of financial exigency even though alternative courses of action, including the layoff of some tenured faculty, may be proven to result in greater long term viability of the institution. In so holding, the court placed great emphasis upon the college's retention of excess property where the immediate sale of that property could have provided resources sufficient to alleviate immediate liquidity.

A reading of the opinion in Bloomfield College is not sufficient to provide a total understanding of the contentions of the parties and the dispute remaining between the parties on appeal.

A contrasting test has emerged from a federal court setting where the basis of financial exigency was predicated upon alleged violations of constitutional due process, rather than upon a breach of college rules or

regulations defining financial exigency and forming a part of the contractual terms governing the relationship between the college and its faculty.

CONSTITUTIONAL DUE PROCESS

In *Johnson v. Board of Trustees,*[85] several tenured members of the faculties of several campuses of the University of Wisconsin brought an action in the Federal District Court for the Western District of Wisconsin. They contended that they were denied minimal procedural due process guaranteed them by the Fourteenth Amendment when the University terminated their contracts as a result of a 2.5 percent reduction in the base budget of the Wisconsin State University System, and reduced enrollments on several campuses. Under state law, the enrollment squeeze required a further reduction in funds available to those campuses.

In *Johnson,* the employment security of the affected professors was generally governed by Wisconsin State statutes which provided in part that, "employment shall be permanent during efficiency and good behavior . . . ." and that the employment of tenured faculty "may not be terminated involuntarily, except for cause upon written charges."[86] The action was officially characterized by the State University System as "layoffs," in part because the applicable state statutes did not specify financial exigency as a basis for termination of tenured faculty, and also because the persons affected would continue as tenured faculty members but without pay and without duties, and would be entitled to first refusal for reinstatement if funds again became available within two years.

The University System employed a reconsideration procedure after the initial decision regarding layoffs which provided written explanations to the affected faculty members of the reason or reasons for the layoffs, if reasons were requested by the faculty member. Each of the campuses completed reconsideration proceedings which were conducted by committees comprised of at least five tenured faculty. Procedures governing reconsideration hearings included access by the affected faculty members to university documents which had been used to make decisions regarding layoffs; the right of the faculty member to be represented by legal counsel and to offer the testimony of witnesses whose testimony possessed relevance to the layoff decision; and a preservation of the record of the proceedings. Affected faculty members were not accorded the right to confront and cross examine university officials who had participated in the decisions culminating in the notices of layoffs.

The reconsideration committee on four of the five affected campuses recommended reconsideration of the decisions of those campuses to layoff tenured faculty members. The reconsideration committee of the fifth campus recommended no reconsideration. However, the chancellors of each of the affected campuses refused reconsideration and persisted in the layoff decisions.

Holding that the affected tenured professors did possess a sufficient property interest in employment to require certain minimum procedural guarantees prior to the effecting of their layoffs, the court said the procedures afforded to the affected faculty members met constitutional due

process requirements in view of the specific situation. The court held that the general federal case law defining minimum procedural protection as required by the Fourteenth Amendment were based upon factual situations focused upon the aggrieved person's conduct or status rather than upon factual circumstances unrelated to alleged performance, conduct, status, or omission on the part of the aggrieved person. Specifically, the court noted that there was nothing in the report of the United States Supreme Court's decisions in *Board of Regents v. Roth* and *Perry v. Sindermann* to suggest that factors such as reduced student enrollment or fiscal exigency had allegedly precipitated the nonrenewals, as compared with factors that related to the particular teacher's performance or conduct. The court generally concluded that situations involving terminations of faculty contracts for reasons of financial exigency are on this basis factually distinguishable from cases involving termination or nonrenewal for cause or in retaliation for the exercise of constitutional rights.

The court saw good reason to afford all tenured teachers an opportunity to be heard at least immediately prior to ultimate decisions concerning the manner in which reduction in funds should be allocated. But it held that the Fourteenth Amendment cannot be read to require the college or university to afford such an opportunity to faculty members to express opinions concerning which colleges or departments should bear a greater or lesser share in fiscal sacrifices.

In relevant part, the court concluded:

> I have decided that the advantage to the teacher flowing from such an opportunity prior to the initial decision rather than after is outweighed by its burden and impracticality from an institutional viewpoint. For example, if inverse order of seniority is to be chosen as the basis for selection, undoubtedly the process of selection would be automatic in nearly every situation. On the other hand, should comparative records of performance or comparative potential performance be chosen as the basis for selection, it is impractical to require that each of the ten tenured members be provided the opportunity to present his or her comparative evaluation.[67]

Such a test preserves to the greatest extent possible the expertise of the academic institution in determining action which should be taken as a result of financial exigency. Under the *Johnson* test, a federal court would decline to interfere with the judgment of the college or university, assuming compliance with the minimum procedural safeguards outlined in the opinion, in the absence of a demonstration that the decisions regarding particular layoffs or terminations were unrelated to the reasonable analysis of valid factors to be considered in such a situation. Moreover, such a test gives the college or university the responsibility for the development of criteria governing which faculty members should be released and determining action which best predicts the retention of a viable academic program in periods of economic retrenchment.[68]

A final question concerns responsibility of the college or university regarding the relocation of terminated personnel within other areas of the institution, or within other institutions within a university system. Any commitment expressed in the policies of governing boards, or the institution itself, concerning the responsibility of the system or the institution to re-

locate terminated faculty should be carefully examined as another factor which might limit the flexibility of the institution in periods of economic retrenchment. Most policies of institutions or governing boards examined by the authors clearly indicate such responsibilities regarding relocation are discretionary and involve only the institution's best efforts at relocation. Such relocation is normally not an enforceable contract right.

SOME GUIDELINES

The college or university administrator faced with the possible termination of tenured faculty contracts on grounds of financial exigency should, if the decision is challenged, be in a position to accomplish the following:

1. Provide a court or other judicial or quasi-judicial tribunal with a sound and reasonable definition of financial exigency.

2. Demonstrate the existence at the institution of financial exigency, as defined by the court.

3. Demonstrate the analysis by the institution of its total financial situation, including all viable alternatives for the resolution of the financial crisis other than the termination of tenured faculty contracts, and sound justification for any rejection of such alternatives.

4. Demonstrate those factors considered in determining which faculty contracts were to be terminated (student enrollment, possible program duplication, cost of instruction and/or research, academic distinction of programs, employee seniority).

It is advisable that the institution involve appropriate faculty individuals and ad hoc or standing faculty committees, senates, and the like, in the examination of alternatives and the definition and application of factors to be considered in determining which contracts should be terminated. It should be prepared to demonstrate such involvement to a court, if necessary, especially in those situations where contract termination is not related solely to seniority.

Each of the cases cited also demonstrates the importance of building a complete record of the initial, continuing, and ultimate stages of decisions to terminate faculty for reasons arising from financial exigency. Should such decisions be challenged in court, their complete documentation should be available. The analysis of all aspects of the program of economic retrenchment and of the fiscal crisis confronting the institution should also be placed in the record before the court by testimony and by all pertinent documentary exhibits. Even though many courts have required the institution to demonstrate only that its decisions regarding layoffs or terminations are reasonable and are not arbitrary and capricious, as in other cases concerning the rights of employees of institutions of higher education, such a demonstration necessarily involves proof by the institution of the extent of the procedures utilized, the criteria developed, and the manner in which such criteria were examined and applied to reach ultimate decisions.

SUMMARY

This chapter has sought to provide the college or university administrator a sound basis for dealing with the employment, evaluation, and retention or nonretention of faculty and staff. Since case law must be viewed within a variety of contexts—including level of state or federal court involved, jurisdictions, and various stages of appeal—one should not interpret specific case decisions as binding in every similar situation. Furthermore, constant changes in federal or state statutes can impinge upon previous employment policies and practices of the institution. The perceptive college administrator, therefore, will seek to understand the legal principles developed in this chapter and then interact with legal counsel in behalf of the institution rather than attempt to play the role of legal expert.

Generally, courts have been reluctant to substitute their judgment in place of the professional judgment of the college or university where a clearly written framework for decision making exists and where uniform and consistent application has been the practice. It is incumbent upon each institution, therefore, to review its personnel policies regularly in light of evolving state and federal legal requirements and in light of the contemporary mission and specific situation confronting that college or university. Publicly known policies together with standards against which decisions can be made will be the best guarantee that the courts will honor the professional judgment rendered in behalf of the institution.

Considerations of equal employment opportunity and affirmative action should be made as part of anticipatory policy formulation rather than to develop as special problems or issues in an unforseen crisis situation. (The same can be said for matters related to collective bargaining.) Similarly, the employment contract should be precise and inclusive with specific dates, conditions of employment, and duly signed by both the employee and the authorized representative of the institution. Each administrator, from the department chairperson to the chief executive officer, is vulnerable to courtroom review in personnel matters; hence it is essential that each one become knowledgeable concerning the general legal obligations and rights of public/private institutions and attains a practicable general understanding of his or her role in carrying out the employment policies and practices of the institution.

Footnotes

1. *See, Bickel,* "The Role of College or University Legal Counsel", Volume 3, *Journal of Law and Education,* Page 73, (January 1974).

2. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (1972); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961); *Powe* v. *Miles,* 407 F.2d 73 (2d Cir. 1968); *Grafton* v. *Brooklyn Law School,* 478 F.2d 1137 (2d Cir. 1973); *Greenya* v. *George Washington University,* 512 F.2d 556 (D.C. Cir. 1975). Compare *Jackson v. Metropolitan Edison Company,* 419 U.S. 345 (95 S.Ct. 449) (1974).

3. *See* note 2.

4. In March of 1972, Title VII was amended to include public institutions of higher education within the definition of employers covered by the Act.

5. 401 U.S. 424, 429-430 (1971).

6. Such a duty may require inquiry into statewide policies, including rules and regulations of State Career Service Systems which affect the public educational institutions as a state employer. Should an institution conclude that state personnel rules and regulations have a disparate impact upon certain members of the affected class which might not be justifiable under court decisions or agency determinations, the institution is obliged to consult its governing board and appropriate state personnel officials. The institution itself is not immune from state or federal investigation or federal or state court litigation challenging such policies or regulations as they are implemented by the institution, notwithstanding that the policies or regulations are mandated for the institution.

7. *See, e.g., Green* v. *Board of Regents of Texas Tech University,* 474 F.2d 549 (5th Cir. 1973); *Toups v. Authement,* 496 F.2d 700 (5th Cir. 1974). *reh* and *reh en banc den.* 502 F.2d 1168 (5th Cir. 1974); *Woodburry* v. *McKinnon,* 447 F.2d 839 (5th Cir. 1971) *reh. and reh. en banc den.* (9-24-71); *Frazier* v. *Curators of the University of Missouri,* 495 F.2d 1149 (8th Cir. 1974); *Rainey* v. *Jackson State College,* 481 F.2d 347 (5th Cir. 1973); *Chitwood* v. *Feaster,* 468 F.2d 359 (4th Cir, 1972). The District Court in *Green, supra,* held that the setting of standards which involve the judgment of professional peers does not invalidate the selection or evaluation process. Agreeing that discretion must be vested in the university in the evaluation of academic professional employees, the Court of Appeals held:

   > "The University's standards are matters of professional judgment, and here substantially every individual or committee in the institution's reviewing body questioned Dr. Green's competence". 474 F.2d at 596.

   See also, Bickel and *Vandercreek,* "Class Action Aspects of Federal Employment Discrimination Litigation", 2 *Journal of College and University Law,* 157 (1975).

8. *See Green* v. *Board of Regents, supra,* n. 7.

9. Federal regulations were revised on July 1, 1973, to remove the exemption for public institutions of higher education from the requirements for maintenance of written affirmative action programs. The enforcement of the Executive Orders and the responsibility for the promulgation of the aforementioned guidelines were given to the Office of Civil Rights, Department of Health, Education, and Welfare, by the United States Department of Labor. The institution should be aware that, although there exists an unfortunate overlap in jurisdiction among several federal agencies (including the Department of Labor, the Department of Health, Education, and Welfare, and the Equal Employment Opportunity Commission) in the enforcement of anti-discrimination laws, the enforcement of affirmative action mandates created solely by the Executive Orders is the

responsibility of the Office of Civil rights, Department of Health, Education, and Welfare.

See, Higher Education Guidelines, Executive Order 11246, United States Department of Health, Education, and Welfare (October 1, 1972).

Note also other federal legislation which requires affirmative action programs in employment, including The Rehabilitation Act of 1973, P.L. 93-112, as amended by P.L. 93-516. The Vietnam Era Veterans Readjustment Act of 1974, P.L. 93-508, 38 U.S.C. 2012.

10. Goals are defined in the Higher Education Guidelines as: * * * * * projected levels of achievement resulting from an analysis by the contractor of its deficiencies and what it can do reasonably to remedy them, given the availability of qualified minorities and women and the expected turnover in its work force. Establishing goals should be coupled with the adoption of genuine effective techniques and procedures to locate qualified members of groups which have previosuly been denied opportunities for employment or advancement and to eliminate obstacles within the structure and operation of the institution which have prevented members of certain groups from securing employment and advancement.

    This definition combines the two basic responsibilities which comprise the concept of affirmative action:

    1. The elimination of employment practices which have an unlawful disparate impact upon members of the affected class and create unjustificable obstacles to their being employed generally or in certain job categories;

    2. The projection of temporary numerical goals which define intended increases in the employment of affected class persons previously excluded from or underutilized in employment generally or in certain job categories.

    Most of the aspects, including written aspects, of an affirmative action program outline the strategy for achieving these objectives and are, in that sense, peculiar to the individual employer and dependent upon the manner in which that employer can best audit its present employment practices and the procedures by which such practices and policies may, if necessary, be modified to conform with equal employment opportunity and affirmative action requirements. The second major portion of an affirmative action program generally plans, implements and administers the methodology by which work force utilization analysis is conducted, goals projected, and the specified program of recruitment, hiring, and internal work force utilization administered. *See, e.g.* 1 CCH Employment Practices Guide, paragraph 6 1636.

11. Existing availability data affects the formulation of these numerical goals. Some generally utilized resource documents on availability are:

    1CCH Employment Practices Guide, Para. 6 1605 *et. seq.;* "Availability Data, Women and Minorities," United States Department of Health, Education and Welfare (June 1973); "Enrollment of Minority Graduate Students at PHD Granting Institutions", El-Khawas and Kinzer, A.C.E. (August 1974); "Minority Groups Among U.S. Doctoral Level Scientists, Engineers and Scholars, 1973," Commission on Human Resources of the National Research Council, National Academy of Sciences (December 1974); "A Resource Document for Implementing Recruitment of Minorities and Women at the Florida State University," (Office of Human Affairs, Florida State University, 1973).

12. *See, e.g., Green* v. *Texas Tech University, supra; Toups* v. *Authement, supra; Woodburry* v. *McKinnon supra* n.7.

13. *See* n.7.

14. Such challenges are particularly applicable to public colleges and universities, and other public employers since they are primarily founded upon the rights guaranteed by the Fourteenth Amendment to the United States Constitution. However, as is discussed later, similar challenges can be advanced under those statutes applicable to the private sector, *i.e.*, Title VII of the Civil Rights Act, 42. U.S.C., §2000e, *et. seq.*

15. 507 P.2d 1169 (Wash. 1973), appeal dismissed, 414 U.S. 1038 94 S.Ct. (1974).

16. 347 U.S. 483 (1954).

17. Compare *Adams v. Richardson,* _____F.Supp._____(D.D.C. 1974); *Geier v. Dunn,* 337 F.Supp. 573 (M.D. Tenn 1972) [Earlier decided as *Sanders* v. *Ellington,* 288 F.Supp. 937 (M.D. Tenn. 1968)]; *Norris* v. *State Council of Higher Education,* 327 F.Supp. 1368 (E.D. Va. 1971); *Kirstein* v. *Rector & Visitors of the University of Virginia,* 309 F.Supp. 184 (E.D. Va. 1970); *Keyes* v. *School District No. 1, Denver, Col.,* 413 U.S. 189 (1973).

18. *See also Alevy* v. *Downstate Medical College of New York,* 359 N.Y.S.2d 426 (1974), affirmed without opinion, Feb. 7, 1975, now on appeal.

19. Although the issue in *DeFunis* was graduate school admissions, the decision would have had an obvious impact upon affirmative action programs in employment.

20. 401 U.S. 424, 430-431 (1971).

21. Higher Education Guidelines, DHEW (Oct. 1, 1972) p.4; *see, Board of Regents, University of Nebraska* v. *Dawes,* _____F.2d_____, 10 CCH EPD Para. 10,377 (5th Cir. 1975). However, *Cf. Mele* v. *U.S. Department of Justice,* _____F.Supp._____; 10 EPD Para. 10,258 (D.N.J. 1975); *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir. 1972) *Cert. den.* 406 U.S. 950 (1972); *Contractors Association of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159 (3rd Cir. 1971); *United States* v. *Wood, Wire and Metal Lathers Int'l. U., Local No. 46,* 471 F.2d 408 (2d Cir. 1973); *United States* v. *International Brotherhood of Electrical Workers, No. 38,* 428 F.2d 144 (6th Cir. 1970), *cert. den.* 400 U.S. 943 (1970); *Local 53 of International Association of Heat and Frost I&A Workers* v. *Vogler* 407 F.2d 1047 (5th Cir. 1969); *EEOC* v. *Int. Union of Elevator Constructors,* 398 F.Supp. 1237 (E.D. Pa. 1975); *Compare, Joyce* v *McCrane,* 320 F.Supp. 1284 (D.N.J. 1970); *Jersey Central Power and Light Co.* v. *Local Union 327, etc., IBEW,* 508 F.2d 687 (3d Cir. 1975).

22. Petition for writ of certiorari was filed in *Waters* (No. 74-1064); Petition for writ of certiorari granted in a similar case, *Franks* v. *Bowman Transportation Co.,* 495 F.2d 398 (5th Cir. 1974). *See note* 25.

23. *In Jersey Central,* the District Court specifically noted that its holding was not made under the Executive Orders.

24. Quoting from *Local 189, United Papermakers and Paperworkers* v. *United States,* 416 F.2d 980 (5th Cir. 1969), cert. den. 397 U.S. 919 (1970).

25. The decision of the U.S. Supreme Court in *Waters* and/or *Franks* must certainly be examined relative to affirmative action in employment.

    It should be noted however that such decisions may not necessarily abate the opportunities afforded protected class persons who should be represented at all levels in the institution's workforce.

    The laws reviewed do not compel seniority systems or mandate that seniority must be the determining factor in job assignment or separation from employment. This is in most instances a matter of contract or regulation of the

institution, either of which may be shaped to accomplish desired goals. A system of seniority and merit, or any other system in which seniority is only one factor would advance the fair representation of minorities and women by attempting to insure that the general statistical impact of layoffs or separation is no greater upon the affected classes than upon heretofore preferred classes. Such a system, which does not establish race, sex or some other impermissible classification as the sole determining factor should be upheld by the courts.

26. Amendments XI—Suits Against States

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens or Subjects of any Foreign State".

27. 421 U.S. 240, 95 S.Ct. at 1627.

28. Compare *Fitzpatrick v. Bitzer,* 519 F.2d 559 (2d Cir. 1975); *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare,* 411 U.S. 279 (1973). Several other cases have been decided and other cases are pending which raise the Eleventh Amendment question relative to the award of attorney's fees. *See, e.g., Gates v. Collier,* 489 F.2d 298 (5th Cir. 1973), (No. 73-1023 and 73-1790) and *Named Individual Members of San Antonio Conservation Society* v. *Texas Highway Department* (5th Cir. No. 74-1231); *Jordan* v. *Gilligan,* 500 F.2d 701 (6th Cir. 1974); *Skehan* v. *Board of Trustees* 501 F.2d 31, (3d Cir. 1974) vacated and remanded 421 U.S. 983 95 S.Ct. 1986 (1975); *Taylor v. Perini,* 503 F.2d 899 (6th Cir. 1974), vacated and remanded 421 U.S. 982, 95 S.Ct. 1985 (1975); *Boston Chapter NAACP,* 504 F.2d 1017 (1st Cir. (1974); *cf. Murgia* v. *Massachusetts Board of Retirement,* 376 F.Supp. 753, 386 F. Supp. 179 (D. Mass. 1974), affirmed without opinion, _____U.S._____, 95 S. Ct. 1972 (1975). Compare, *Class v. Norton* _____F.2d_____43 L.W. 2228, No. 74-1702 (2d Cir. 1974) and *Downs* v. *Department of Public Welfare,* _____F.Supp._____43 L.W. 2270 (E.D. Penn. 1975). For a more complete discussion of the subject of the Eleventh Amendment immunity, *See Bickel and Vandercreek,* "Class Action Aspects of Federal Employment Discrimination Litigation," *supra,* Notre 7.

29. *See, Petty* v. *Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 276, 79 S.Ct. 785, 787 (1959); *Murray* v. *Wilson Distilling Co.* 213 U.S. 151, 29, S.Ct. 458 (1909); *Smith v. Reeves,* 178 U.S. 436, 20 S.Ct. 919 (1900); *Harris v. Tooele County School District,* 471 F.2d 218, 221 (10th Cir. 1973); *Williams* v. *Eaton,* 443 F.2d 422, 428 (10th Cir. 1971); *Richins* v. *Industrial Construction, Inc.* 502 F.2d 1051, 1056 (10th Cir. 1974). *See also, Bragg* v. *Board of Public Instruction of Duval County,* 36 So.2d 222 (Fla. D.C.A. 1, 1959); *Wilson* v. *Dade County Board of Public Instruction,* 272 So.2d 179 (Fla. D.C.A. 3, 1973); *Elizabeth River Tunnel Dist.* v. *Beecher,* 202 Va. 452, 117 S.E.2d 685 (Sup. Ct. App. 1961).

30. *Wood v. Strickland* 421 U.S. 921, 95 St.Ct. 992 (1975).

31. *Wood* v. *Strickland, supra. See also, Schiff* v. *Williams,* 519 F.2d 257 (5th Cir. 1975).

32. *See e.g., Local 189, United Papermakers and Paperworkers* v. *U.S.,* 416 F.2d 980 (5th cir. 1969); *cf. Jersey Central Power and Light Co.* v. *Local Union 327, etc. of IBEW,* 508 F.2d 687 (3d Cir. 1975), reh. and reh. en banc denied (3-4-75). Unemployment and Workmen's Compensation Laws and the Occupation, Safety and Health Act are examples of other laws governing employment. All of these laws are not addressed herein, but should be familiar to personnel administrators or other institutional offices.

33. *Slochower* v. *Board of Higher Education of City of New York,* 350 U.S. 551 (1956).

34. *See, Slochower, supra,* 350 U.S. at 555-556, 559.

35. Ibid. *See also Duke* v. *North Texas State University,* 469 F.2d 829 (5th Cir. 1973); *McEnteggart.* v. *Cataldo,* 451 F.2d 1109, 1111 (1st Cir. 1971); *Fluker* v. *Alabama State Board of Education,* 441 F.2d, 201, 207 (5th Cir. 1971); *Cornwell* v. *University of Florida,* 307 So.2d 203, 210-211 (D.C.A. 1, 1975); *cf. Smith* v. *Losee,* 485 F.2d 334 (10th Cir. 1973).

36. Compare, *Duke* v. *North Texas State, supra,* with *Smith* v. *Losee, supra.*

37. 408 U.S. 564 (1972).

38. 408 U.S. 593 (1972).

39. Ibid. *See also* note 7.

40. *See Ferguson* v. *Thomas,* 430 F.2d 852, 858-859 (5th Cir. 1970).

41. This principle is particularly important in instances where an employee is involved in union activities or becomes an outspoken critic of the administration of the college or university. This activity may increase the likelihood that the employee will assert an unconstitutional denial of freedom of speech or association in the event he or she is not rehired. It becomes important in these instances that the valid reasons for such decisions be documented and supported by academic or administrative department heads and by colleagues who have participated in the review process and, who, in many instances, actually recommend the action taken by the department head. It is not sufficient for the employee to establish his or her union activity, or outspokenness against the administration. He or she must establish a causal relationship between such activity and the decision not to renew his or her contract of employment (or a decision not to grant promotion or tenure). *See, Cornwell* v. *University of Florida, supra,* and cases cited therein.

42. *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 573 (1972).

43. 408 U.S. at 575.

44. *Jablon* v. *Trustees of California State Colleges,* 482 F.2d 997 (9th Cir. 1973)__ . See also *Ortwein* v. *Mackey,* 511 F.2d 696 (5th Cir. 1975). Administrative employees are in a similar posture. *See e.g. Whatley* v. *Price,* 368 F. Supp. 336 (M.D. Ala. 1973). The Court held in *Jablon* that reasons raised at grievance hearings initiated by a faculty member, which reasons all related to the academic performance of the faculty member, and which demonstrated that his performance did not merit retention imposed no stigma of the type referenced by the Supreme Court in *Roth.* In *Cornwell, supra,* the State Court of Appeals held that, in several respects, the actions of the University in choosing to deny Dr. Cornwell tenure and recommend his nonrenewal negated his allegation that he was deprived of an interest in "liberty". First, the Court noted that the sixteen month notice given prior to the effective date of his nonrenewal by his own testimony afforded him adequate time for professional relocation. Further, the Court found that there was no evidence that the notice of nonrenewal or any acts of the University in effecting the nonrenewal restrained or interferred with Dr. Cornwell's right to contract with any other prospective employer, or with his right to engage in any other activity protected by the guarantees of liberty within the Fourteenth Amendment, as defined by *Roth.* Finally, and perhaps most importantly, the Court of Appeals struck down any allegation that the publication of reasons for the University's action, which reasons related to the professional and perhaps personal reputation of Dr. Cornwell imposed upon him any stigma affecting his interest in liberty, where such reasons were supplied at the request of Dr. Cornwell and the testimony supporting such reasons and discussing his professional abilities took place at a public hearing demanded by Dr. Cornwell.

45. It is advisable that initial letters of nonrenewal contain only a statement that the faculty member's (or other employee's) current contract will not be renewed beyond the specified expiration date. *See, e.g., Ferguson* v. *Thomas, supra,* 430 F.2d at 856, where the Court stated:

> "We doubt the wisdom of requiring the college to initially detail all its charges in such cases. In the majority of terminations for cause many adversary matters would be best left unsaid for the future good of the instructor and the institution. At the outset, the College need merely indicate that termination for cause is in the offing. If the professor accepts the situation, so be it. If the professor challenges the termination, then the College should come forward with its slate of reasons and the above procedures thus commenced".

This guideline may also be applied to notices of nonrenewal.

46. *See note* 36, *supra.*

47. *See note* 40, *supra.*

48. 430 F.2d at 854.

49. 430 F.2d at 854.

50. F.2d at 856.

51. 415 F.2d 851 (5th Cir. 1969).

52. 412 F.2d 1128 (D.C. Cir. 1969).

53. As in *Roth.* Robert Sindermann also claimed that the decision not to renew his employment was based in part upon retaliation for his exercise of rights protected by the First Amendment to the United States Constitution. These portions of the Court's holding are not pertinent to this discussion.

54. 408 U.S. 593, 601, note 6.

55. 408 U.S. 593, 600.

56. 408 U.S. 593, 601. *Perry* v. *Sindermann* did not create a totally new right for public employees. In *Vitarelli* v. *Seaton,* 359 U.S. 535, 539-540 (1959), the United States Supreme Court held that where regulations of a federal agency mandated certain procedural standards for actions separating federal employees from their employment for reasons of national security, the agency was bound by those regulations where the regulations afforded greater procedural protection in the case of a dismissal for security reasons than in the case of dismissal without any statement of reasons therefor. Specifically, the Court held that having chosen to proceed against an employee on security grounds, the Secretary of the Interior was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged the nonpermanent employee summarily.

57. *Ferguson v. Thomas,* 430 F.2d at 856: *See also, Vitarelli v. Seaton,* n. 56. Administrative Procedures Acts of the various states may create procedures which must be followed in effecting employment decisions such as nonrenewal of appointments. Legal counsel should determine which state agencies are governed by such statutes; under what conditions such statutes are applied; and procedures to be followed in statutory proceedings. *See also Whatley v. Price,* 368 F.Supp. 336 (1973), as it relates to administrative employees.

58. Ibid, *See Hostrop v. Board of Junior College District, No. 515,* etc., Ill., 471 F.2d 488 (7th Cir. 1972), for a discussion of nonretention of chief administrators.

59. *Board of Regents* v. *Roth, supra,* 408 U.S. at 603. *See also Ferguson, supra,* at 856.

60. 408 U.S. at 586.

61. 430 F.2d at 858.

62. 482 F.2d 997.

63. *See, e.g., Tucker,* "Financial Exigency-Rights, Responsibilities, and Recent Decisions," 2 *Journal of College and University Law* 103 (1975).

64. *See, Brief on behalf of Bloomfield College, et al., filed in American Association of University Professors, Bloomfield College Chapter, et al.,* v. *Bloomfield College, et. al.,* Docket No. A-198-74, Superior Court of New Jersey, Appellate Division.,

65. No. 74-C-142 (W.D. Wis., June 13, 1974).

66. Wisconsin Statutes, §3731.

67. See n. 65

68. *See also Levitt, et al.* v. *Board of Trustees of the Nebraska State Colleges, et. al.,* No. 73-L-221. (D. Neb., June 10, 1974), wherein the court held that where lack of funds necessitated releasing a sizable number of the faculty, it was peculiarly within the province of the school administration to determine which teachers should be released, and which retained. Where there is a showing that the administrative body in exercising its judgment, acts from honest convictions, based upon facts which believed in the best interests of the school, and where there is no showing that the acts were arbitrary or generated by ill will, fraud, or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body.

In *Levitt,* the District Court for the District of Nebraska specifically approved the recognition of the AAUP that the retention of a viable academic program should necessarily come first in the difficult and often competing considerations that must be taken into account in deciding upon particular staff reductions as a result of economic retrenchment. This recognition significantly contrasts with the holding of Judge Antell in the Bloomfield College case which appears to place short term liquidity above long term viability of the institution as a guide post for the examination of alternative courses of action to meet situations resulting from financial exigency. This point is made with some force in the brief of Bloomfield College on appeal.

Chapter II

Security on the Campus

Dennis Hull Blumer and Jerrold L. Witsil

Security on the campus remains an important issue for college administrators. In the late 1960's and early 70's security attained prominence as an issue in the wake of student unrest. The growing complexity of problems related to student discipline and the increasing incidence of crime on campus have served to keep this issue in the forefront.

The legal issues related to the problems of security on the campus are quite varied. At the outset it must be said that criminal statutes and applicable common law often vary from state to state. Therefore, legal counsel should be consulted in particular situations. This paper will attempt to discuss a number of issues which may have general applicability from campus to campus, but the authors cannot hope to cover even the more important variations among states.

This paper will discuss some general problems of the security function on campus, and will suggest alternative solutions. It will then discuss some of the legal issues connected with campus security with a view toward highlighting the complex and technical nature of this important area.

The late 1960's and early 1970's brought to campus a number of new concerns with regard to campus security. Panty raids, beer busts, and college pranks faded, far overshadowed by collective violence, sabotage, and higher crime rates. Street violence in response to the military draft and United States intervention in the Vietnam war expansion into Cambodia brought building takeovers, highway blockades, bombings, and acts of arson. Class boycotts and strikes occurred frequently.

Educational institutions gained unwanted notoriety through media coverage of these protest activities. Some security directors believe that this public exposure was partially responsible for the increase in criminal activity that followed. During recent years a dramatic increase in violent crime, rapes, robberies, and even homicide, has taken place on the college campus. Campus administrators are finding themselves caught in a fiscal crunch between decreasing budgets and increasing loss from theft and vandalism.

CRIME PREVENTION

Crime prevention efforts are being increased in order to cut down on free access to college property. Campus security officers are working with

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academic and administrative personnel for greater security awareness. Some adminstrators have suggested to department heads that funding for replacement of stolen items must come out of their budgets if proper preventive measures have not been implemented. Devices that lock typewriters, calculators, and laboratory instruments are being demonstrated by many security department representatives. Posters, hand-out material and labels urging prevention techniques are being distributed. Security officers are electrically engraving both college and personal property for identification to reduce vulnerability to theft.

The desirable openness of a college community often invites crime and makes security maintenance difficult. Some administrators have been faced with the task of weighing the value of openness against possible criminal activity and its impact on the college community. Colleges have implemented a program of restricted access to campus grounds and buildings. The utilization of monitoring security officers at points of vehicular access to campus has helped some campuses. Building monitors, both human and electronic, have reduced accessibility to equipment. In response to campus violence and other criminal activity, administrators have increased security department staff, sought greater legal authority for them, and, in general, have professionalized the men and women officers of the department.

Many campus security departments have adopted organizational structures, uniforms, and equipment similar to their surrounding law enforcement agencies. According to a 1970 Law Enforcement Assistance Administration survey on campus security by Seymour Gelber[1], the trend toward legislative authority for public educational institutions is increasing. Campus security officers have moved toward the "real police" role as a result of new statutory authority with regard to law enforcement responsibilities.

This trend has not been without controversy and role conflict. Community members, faculty, staff, and students have often viewed the transition as dangerous and unwarranted. There has been student protest over the arming of campus security officers and the extension of greater authority to them. Along with new authority has come new mandates and compulsory procedures. The use of criminal arrest and court prosecution became common on campus. No longer were campus officers permitted to turn their backs on pranks which might constitute criminal activity in violation of state, county, or local statutes.

The security officers themselves found the role change difficult. With the "real police" image dangling in front of them as an incentive, including increased police training and newly gained authority, the role as service officer became alien to their perceived image. Administrators were faced with a complex problem of professionalizing security officers to combat increasing criminal activity without losing sight of their service role to the campus community. Functions traditional to campus security such as locking and unlocking buildings, escorting administrative cashiers with money deposits, transporting injured students to the campus infirmary, providing transportation to airports and meetings for chief administrators, and delivering hand carried documents became undesirable assignments to the "new concept officer."

DIFFERENT APPROACHES TO SECURITY

A recognition that each college campus consists of individual characteristics is essential to determining the type and extent of campus security services required. The size of the institution, both in population and physical area, is an important consideration. Is the student body largely a commuting populace or is it residential? Is the campus rural, urban, or suburban? What of the surrounding community crime rate? These and all other aspects of the campus should be reviewed with proper authorities in determining the type of campus security force to be maintained. The campus history of criminal activity and any recent changes should be considered. The amount of support from local law enforcement agencies is an important factor.

Once this review has been made, campus administrators have a number of alternative security department concepts from which to choose.

If the crime rate on campus has not been too severe, a maintenance security operation may suffice. There are a number of private security contract agencies available to provide maintenance security on campus. These agencies can furnish uniformed officers under a contractual arrangement to guard certain buildings, grounds, or projects. They may also be called upon to conduct investigations and surveillance of areas of high larceny rates. One advantage of the private security company is that the campus receives security coverage without the need to employ full-time security officers. An hourly rate is usually established with the contract officer employed when needed.

The security officer company recruits, trains, and equips the contract officer for assignment to campus. Competitive bidding by several contract security companies usually results in an economical means of providing the campus with security services. Disadvantages of utilizing contractual security services often include high turnover of personnel and lack of familiarity of campus layout, personnel, and functions. A lack of authority hinders some contract officers because of local legislative restrictions.

If contractual security services are selected to provide coverage on campus it is often desirable to employ *one* full time security director or coordinator. This employee should have the experience and education to oversee the contract officers. The coordinator could then bridge the gap between the outside security officers and student, faculty, and staff members.

The coordinator should participate in meetings with members of the college community to determine specific areas of concern and need so that the contractual services might be geared toward problem solving and required services rather than merely superficial coverage of campus. The coordinator should also have the support of the campus administration and direct access to the chief administrator. Finally, coordination and liaison with local law enforcement officials is a must for the effective security coordinator.

A campus which has been subjected to a large amount of criminal activity or which has particular needs should consider its own in-house security department. The security director should be administratively as-

signed to the office of the vice president for administrative affairs, with direct access to the president when necessary. Since the security department must concern itself with problems throughout the campus, and from time to time will become involved in investigations that might involve employees of other departments, it is unwise to have the security director reporting to the director of physical plant, student services, or auxiliary services.

The totality of the history, present needs, and projected future of campus crime should govern the type of in-house security organization required. Some campuses will only require blazer-attired, nonsworn and unarmed security personnel serving in a watchman capacity during evening hours. Other campuses will require a full service law enforcement agency armed with both weapons and arrest powers. A myriad of combinations are available, depending upon the needs of the campus.

Campus administrators are often at a loss to determine the type and size of security services for their campus. Security service consulting firms are available to assist administrators in making this determination. Professional consultants may be called upon to survey the needs of a campus and recommend the number of security officers, the role and authority of the director of security and the officers, and the type of equipment required. Consultants may also be called upon to review existing campus security organization for structure, function, effectiveness, and equipment.

In a study published in 1972, it was stated that 27 of the 50 states grant power to the state governing body for higher education to appoint campus security officers with powers of arrest.[3] The remaining states permit some form of deputization through the governor, courts, a law enforcement agency, or a city government. Private institutions are granted direct authority in only seven states. They must ordinarily rely upon deputization by local police agencies.

SOME LEGAL CONCERNS OF POLICE

There are many legal matters which are of concern to both the campus director of public safety, and to the campus administrators with which he works. Following is a discussion of some representative ones.

Of prime importance to campus officials is the breadth and extent of the legal powers of campus security personnel. The range of police powers can be quite great. In the wake of increasing security problems, the trend to extend full police powers to increasing numbers of campus security departments is continuing. Such powers carry with them both advantages and disadvantages. From the policeman's point of view these powers have the advantage of the increased discretion which the law allows a commissioned police officer. His powers of arrest are broader than those of a private citizen, for example. He has increased discretion in carrying weapons, investigating crimes, and making arrests.

Such full police powers can be of distinct advantage in maintaining security on the campus. However, it is not an unalloyed advantage. College administrators may find themselves inhibited in both the lawful and practical control of fully commissioned police officers. Some states forbid college administrators from interfering with a policeman's arrest discretion. This will occasionally mean that this internal department will have a

measure of autonomy not accorded other administrative departments within the college or university. Moreover, it may mean that the security department does not develop sensitivity to the special needs of the community. This can be of great disadvantage if the college administration wishes the security department to be a campus service as well as a police department.

Many campus security departments have powers less than full police powers. Officers may be classified as wardens, as security guards, as special policemen, as private investigators, or simply as university employees with no powers beyond that of a private citizen. As discussed above, such arrangements may be sufficient, depending upon the campus. But care should be taken that the training of such personnel is not lacking, especially with respect to the limits of their powers and jurisdiction.

TRAFFIC CONTROL

Traffic control on campus is based entirely upon applicable local statutes, ordinances, rules, and regulations. On some publicly funded campuses, the streets of the campus are mere extensions of the streets of the surrounding city, state, or county. The rules are the same. Thus, if the campus police officers are fully commissioned officers, they issue citations in much the same manner as do local police. If they are not commissioned officers, local police may do the enforcing. If the streets of the campus are not subject to state, county, or city traffic laws, they may simply be subject to rules and regulations promulgated by the college board of trustees. Legal status would, of course, be less than that of state laws. Thus, while members of the campus community—students and employees—might be subject to administrative discipline if they were not to follow the rules, visitors probably would not be subject to such rules. Thus the problem of enforcement becomes difficult.

With respect to visitors, the campus may have only powers similar to that of a private citizen in protecting his own land from trespass. Thus, under certain conditions the campus may tow trespassing vehicles, bring an action of civil trespass in the courts, and the like.

Where police powers are given to campus security officers, they may issue their own citations, enforceable in local courts. Otherwise, fines for violations by visitors are probably not collectible as a practical matter. When a local court collects a fine, ordinarily it will not be passed back to the campus.

POWERS OF ARREST

In a few states, administrative rules of campus boards of trustees have the power and effect of law. Thus, traffic rules, rules of discipline on university grounds and in university buildings have the power of law once they are promulgated by the board and duly published. Violation of these rules are misdemeanors punishable in the state courts. Fines levied for violation of these rules, minus court costs, may be turned over to the university or college for scholarships. Such an arrangement seems to work well for campuses. But it requires a legislative enactment.

A detailed discussion of technicalities of the rights and duties of police

and citizens during arrest procedures is beyond the scope of this paper. Administrators who supervise college police should understand the range of arrest powers accorded their officers. Moreover, they should assure themselves that the training of the officers and the supervisory function in the police department is such that this highly technical area is adequately maintained. Lack of proper procedures might lead to lawsuits by citizens wrongfully detained or arrested. The dangers attendant upon the misuse of arrest power are considerable. Mere detention without cause can itself constitute a common law tort, e.g., false imprisonment. False imprisonment is defined in common law as the intentional confinement of another without his consent and without legal justification. It does not simply include cases where the victim is actually imprisoned. It would include many situations where his freedom of movement was limited. It does not require detention within a room or behind a fence or wall. It includes constraint of one's right to move about freely.

Arrest itself could bring charges such as malicious prosecution. At common law, such prosecution is defined as malicious criminal proceedings initiated without probable cause. (It requires a showing that the proceedings have been terminated in the plaintiff's favor, and a further showing of damages.)

Depending upon the circumstances, other torts may be applicable, for example, libel and slander, or assault and battery. The exact applicability of all such torts depends upon the law of the particular jurisdiction.

If improper arrest by a commissioned officer is dangerous, citizens' arrests by untrained campus officials are much more so. At common law, a private party may arrest when a felony is committed in his or her presence or when there is reason to believe that a felony has been committed in his or her presence. The person may arrest even though the felony was not committed in his or her presence if the private person has probable or reasonable cause to believe that the person arrested committed the felony. As to misdemeanors, a private person may arrest without warrant for misdemeanors actually committed in his or her presence.[3]

These standards are often difficult in application. In the view of the authors, citizens' arrests by university personnel should not be attempted.

It should be noted here that some states have statutes allowing shopkeepers to detain customers whom they suspect of shoplifting. Administrators who operate college bookstores should ascertain their exact rights and duties in such situations under state law.

CRIMINAL VERSUS CAMPUS CHARGES

A frequent problem for colleges and universities is that of discerning the differences between the rights and duties of students under the criminal law, and under college disciplinary rules. It is sometimes true that criminal charges and university charges may be lodged under the same facts. For example, a student may knowingly write a bad check in payment of his bill. He might thereupon be charged under the criminal law with false pretenses, and under university rules with failure to meet his financial obligations. The student will thereupon be tried both in criminal court and before a campus hearing officer or board. Such a situation is not double

jeopardy. The Fifth Amendment right against double jeopardy has to do with two or more criminal trials only. It does not apply to administrative hearings which carry no criminal sanctions. Indeed, it has always been the case that one can even have two trials in court arising out of the same circumstances, provided that both are not criminal charges. For example, one might be charged in criminal court with vandalism for breaking the window of a school. He might simultaneously be the defendant in a civil trial in a suit for damages by the school.

Nevertheless, it is always wise for campus police to be in close contact with the district attorney in such cases. Cooperation is required with that official as he presents his case in criminal court, even if this may require putting the campus charges in abeyance.

Another recurring problem in this area is that of the role of police in university administrative hearings. Since student disciplinary hearings are administrative in nature, the rules for admissibility of evidence are less stringent than those for a criminal court. As the reader is undoubtedly aware, defendants in criminal trials have constitutional rights against the admissibility of evidence illegally obtained. For example, the products of an illegal search by a police officer (e.g. drugs obtained during a illegal search) will not be admissible. These strict rules do not apply at administrative hearings. Nevertheless, it is the duty of police officers and university hearing officers to assure that the student is treated fairly. The more lenient rules of an administrative hearing should not be the impetus for improper police tactics.

SEARCH AND SEIZURE

The complexity of the duties of a campus law enforcement officer come into full focus in problems of search and seizure. The Fourth Amendment to the U.S. Constitution prohibits unreasonable searches and seizures, and states that "no warrants shall issue, but upon probable cause." Consent is grounds for a reasonable search, if not coerced. It is true that college officials may by reason of university regulation or otherwise, have the implied consent of students to inspect lockers or dormitory rooms. The right cannot be shared with police officers, even campus police officers. Officers must obtain their own consent or waiver, or obtain a warrant, or be covered by one of the exceptions to the rule requiring warrants.

If in the course of an unreasonable search, the officer finds evidence for subsequent legal charges, this evidence will not be admissible at trial. Under what is called the exclusionary rule, evidence illegally seized by law enforcement officers may not be used at a subsequent criminal trial. It is true, however, that such evidence might be used at a campus disciplinary hearing, since the formal rules of evidence do not apply there.

A related issue is whether evidence seized by college administrative officials (as opposed to campus police officers) may be used at criminal trial. The prevailing rule is that evidence obtained by illegal search and seizure by a private individual is *not* excluded at a criminal trial. However, some courts have held that a *public* school official is a "governmental agent" and his actions must be treated the same as those of a police officer for purposes of the exclusionary rule.

If the exclusionary rule is applicable, the question arises as to whether the search by the college official was a reasonable one. This is determined by many factors, including college regulations, custom, and the nature and circumstances surrounding the search. College officials are well advised to proceed cautiously in this area. Warrantless searches of persons and property is a ripe area for possible invasion of constitutional rights. In the absence of emergency of a pressing nature, it is always best to conduct searches pursuant to a warrant.

LIABILITY OF A CAMPUS OFFICER

The liability of a campus police officer for his own acts depends in part on his powers and duties. For example, in some jurisdictions public police officers (as opposed to, say, private policemen for a private university), may qualify for immunity from prosecution for non-malicious civil offenses. They may be extended this right in their capacity as public officials. The actual application of this rule varies from state to state. However, in most states, public police officers are liable for their misdeeds: such matters as negligently causing personal injury or death, false arrest, libel or slander, malicious prosecution, violations of the civil rights of another, or assault and battery. As the master of the erring police officer, the institution may be liable for the officer's unlawful acts as well, under the legal doctrine of *respondeat superior* (a master must answer for the acts of his servant). However, if the institution is a public one, and depending on the applicable state law, the institution may be immune from suit under the doctrine of sovereign immunity (in many jurisdictions, the government is immune from tort liability under this doctrine). The institution can thus escape liability even though the officer does not. Some institutions insure their officers against such suits, of course, or the officer may carry insurance himself.

Campuses have traditionally opened their doors to the surrounding community for public use and enjoyment. However, individuals may abuse this privilege. Increasing numbers of urban campuses are closing their doors to the public after certain hours. They are also posting security guards at entrances to the campus. College administrators should be conversant with the applicable law of trespass. In addition, the state may have a special statute having to do with public access to buildings and grounds of public colleges.

As stated earlier, the needs of the campus must dictate the type and extent of campus security services. The proper evaluation of needs will provide a firm basis for security development. There are two distinct forms of campus security organizations to be found on campuses today—security based on the concept of service and security based on professional law enforcement.

Many college administrators view the role of campus security as a service organization to assist the members of the academic community while they are on the campus. Simply put, faculty teach, students learn, and staff provide supporting services. Campus security officers provide services to make the campus safe and secure from interruption and crime so that faculty can teach and students can learn. The concept of service

might include active participation in campus activities as advisors to various clubs and associations, fraternity and sorority houses, and intramural sports. The security officer will also provide security at special events and general preventative patrol.

The security organization usually will consist of a mixture of uniformed security guards, with some civilian attired officers known as security officers, campus police, or proctors. Security guards serve at the entrances to campus grounds and buildings, providing visitors and members of the community with assistance, information, and direction. The civilian attired officers respond to reports of crime and investigate deeds of misconduct, vandalism, and minor violations of law. Such security organizations usually have working relationships with local law enforcement authorities who respond to reports of serious crime and major investigations.

Security officers provide transportation on campus for students in need of minor medical assistance and safe passage during night hours. Campus department cashiers are escorted to local banks. Buildings are locked and unlocked. Students forgetting or losing their keys are admitted, upon proper identification review, to their dorms and rooms. A lost-and-found service is usually maintained by security, and storage is provided for bicycles and other personal property.

Underlying all aspects of security is a theme of service to campus members.

SECURITY AS A PROFESSIONAL POLICE FORCE

The campus located in a high-crime-rate area or in such a remote place that outside assistance is not available will usually find it necessary to provide its community with a full service law enforcement agency. Normally, this type of campus security organization will be organized similarly to municipal law enforcement agencies. Uniformed patrol officers in marked police vehicles with emergency equipment will be supported by officers assigned to detective duty, traffic, and communications. The agency usually includes a training and education bureau as well as a records bureau.

Officers in this type of campus security force are usually armed with both arrest authority and firearms. Strict administrative policies governing use are usually in force. Arrest authority may come from legislation or special police commissions from local law enforcement agencies. Specialized training on firearms use and safety is obtained from local police academies. Constitutional law and procedures of arrest are also provided by academy training. Officers in this category are usually covered in a state mandate for minimum standards of law enforcement training.

The underlying theme of campus security agencies in this category usually constitutes compliance and enforcement with little service activity. Officers consider themselves police officers and students view them much the same. The camaraderie existing between service-oriented officers and students is usually not found on campuses requiring full service law enforcement officers.

Support from local police departments is usually only necessary during major disruptions and special events. Technical assistance from

crime laboratories and special investigations is still obtained from supporting agencies, however. The rank structure of these departments normally includes such paramilitary labels as captain, lieutenant, sergeant, private.

College pranks and misdeeds are often viewed by these departments as vandalism and disorderly conduct subject to criminal prosecution. Officers so commissioned are required to comply with court rulings and are governed by court prosecutors, grand juries, and attorney general interpretations. In effect then, they serve two masters. The college governs their routine security duties, and the courts and legislative enactments govern their law enforcement duties. College administrators should explore fully the legal implications of such commissioning before jumping full scale into the "real police" concept.

THE HAPPY MEDIUM

Most campus administrators find that there is a happy medium between full law enforcement-oriented and service-oriented departments. Obtaining and managing the proper blend of personnel and functions is the real task campus administrators face.

One way to provide for the needs of all segments of the community is to have different types of officers on campus at the same time. Campus police officers with full authority may be deployed on campus to prevent crime and to respond to reports of criminal activity. The number of these officers should be dictated by the experience of crime on campus and in the surrounding community.

A second group of officers could consist of guards or security officers providing watchman services to campus facilities, locking, unlocking, and patroling in and around buildings. These officers should be attired in uniform but without weapons. They would not require arrest authority or firearms.

The third type of officer could be designated as a community service officer performing such services as escort, lecturing transportation, and general assistance. These officers need not be uniformed. But for identification purposes and public relations, they are best attired in blazers with distinctive emblems identifying their agency and role.

Clear-cut policy and procedures for each group of officers will assist in providing services meeting all the needs of an academic community and avoiding an "over-kill" or wasteful approach to campus security.

Footnotes

1. Seymour Gelber, *The Role of Campus Security in the College Setting*. Washington, D.C.: Department of Justice, 1972.
2. *Ibid.* See e.g. pp. 34-35.
3. See e.g. GA Corpus Juris Secundum, Arrest §§ 14-15.

Chapter III

Copyright on Campus

R. Joel Tierney and Jeffrey G. Lalla

The protection afforded to the expression of ideas and the technology of printed materials, recordings, visual images, and the storage and retrieval of intellectual property have prompted education's management to seek a better understanding of the rudiments of intellectual property law. The following represents a summary of some of the elements of copyright law so that administrators can be alert to potential rights, and problems, and recognize the need and appropriate time to secure the services of experienced counsel.

The law of copyright is peculiarly applicable to, and inextricably a part of education, for one of the express purposes of the law is to encourage education through the production of intellectual works for the benefit of the public. The manner in which the law's purpose is accomplished is by granting a limited monopoly to the author and thereby guaranteeing the opportunity for financial reward for the author's genius and intellectual industry. The financial aspect of copyright law is, however, secondary to the purpose of encouraging intellectual work for the benefit of the world. The doctrine of "fair use" is a prime example of the law's subordination of method to purpose, especially in the context of the academic community.

LEGAL BASIS: STATUTORY COPYRIGHT

Copyright law creates certain property rights in literary, dramatic, musical, artistic and other intellectual works and grants such property rights to the authors of the works. Like the law pertaining to other types of property, copyright property consists of a number of separately identifiable rights governing the use of the particular article of property. In general, the copyright statutes grant to the author the exclusive right to print, reprint, publish, copy and vend the copyrighted work. This bundle of property rights is not, however, unlimited. Each of the rights can exist only for a limited time and a particular right may vary with the type of work involved. For example, an unauthorized public performance of a dramatic work would infringe the author's copyright protection, whereas the unauthorized public performance of a musical composition, if not for profit, would not infringe the author's rights.

The Constitution of the United States, Article I, Section 8, grants to Congress the power:

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To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

On the basis of this enabling power, Congress has from time to time enacted statutes dealing with copyright, most notably the current copyright law enacted in 1909 and codified as 17 United States Code §1. This legislation essentially sets forth the various property rights and procedures necessary for acquiring such protection, enumerates penalties and procedures for infringement claims, and establishes the Copyright Office Procedures.

COMMON LAW COPYRIGHT

Unpublished works which have not been copyrighted under federal statutory procedures may have certain protections afforded under state law. This is known as common law copyright and is dependent upon the law of each state as to the exact nature and scope of protection. The protection is sometimes broader than, and sometimes less than, that given by statutory copyright. However, once a work is published or statutorily copyrighted it loses all rights under common law copyright *and is exclusively* governed by federal copyright statute.

There is no established singular body of international copyright law, in the sense that a single copyright code is uniformly applied throughout the world. The laws of the particular country govern such materials. The United States is, however, a signatory to a number of treaties and conventions with other countries whereby reciprocal copyright protection is accorded to foreign works. Foremost among these is the Universal Copyright Convention whereby a signatory country gives the same protection to foreign works which comply with convention requirements as it does to its domestic works.

DISTINCTIONS WITH OTHER PROTECTED INTERESTS

Patents: A patent is a similar right, granted by the federal government pursuant to constitutional grant, to exclude others for a term of 17 years from making, using and selling a useful, new and unobvious process, machine, manufacture or composition of matter. A patent is acquired by the filing of an application in the United States Patent Office and a determination by that office that the invention is patentable. Patent rights may be lost by failing to file on appropriate application for more than one year after publicly disclosing the invention, by publicly using the invention or commercialization, or by abandonment.

Trademark: A trademark is a word, name or symbol that represents and indicates the source or origin of the goods or services with which the word, name, or symbol is associated and which is capable of distinguishing such goods or services from those of others. The trademark is created by affixing it to the article in commerce and distributing it in commerce. Federal registration is obtained by the filing of an application for registration in the United States Patent Office, and, subsequent to examination by departmental trademark examiners and an opportunity by interested parties to oppose such application, the trademark may be de-

termined to be registerable. The protection may be lost by abandonment or proscribed misuse.

Trade Secrets: A trade secret is generally defined as commercial information not generally known in the trade which gives its owner an opportunity or advantage over others who do not know or use it. Such information may include formulae, processes, patterns, machines, confidential customer lists and unpatented inventions. The trade secret is protected against theft or improper disclosure by one under an obligation of confidentiality whether express or implied. The trade secret rights are acquired by creating the information, and may be lost by failing to maintain reasonable security of the secret, independent creation by another, or unrestricted disclosure by the owner to another.

There are clear similarities, distinct differences and some overlap in the protection afforded various intellectual property rights.

Institutional policies should be established to identify objectives, to clarify the relationship between the institution and its staff, and should be reviewed periodically to determine whether the objectives are being achieved. Those objectives may be to secure a favorable protected competitive position, to be compensated for the efforts and expense of creativity and the furtherance of additional original efforts, to protection of the integrity of the subject matter or the direction of its presentation to the public and to assist in bringing the material into public use.

COPYRIGHT ELIGIBILITY

Elements of copyrightability: To be eligible to claim copyright protection, the work must be both original and reduced to tangible form. The originability requirement does not mean the work must be novel or unique; it merely means the work is the independent product of the author. In *Alfred Bell & Co. v. Catalda Fine Arts,* 191F.2099 (2 Cir. 1951), the court states:

"All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own'. Originality in this context means little more than a prohibition of actual copying: no matter how poor artistically the 'author's' addition, it is enough if it be his own." The ideas contained in the work are not copyrightable; they are merely the form of expression of the ideas which are copyrightable. Thus if the work is independently conceived although identical with another work, it is still copyrightable. A minimal quantum of originality or creativity, however, is required. As an example, the following are not eligible for copyright protection: words and short phrases such as names, titles, and slogans; mere listings of ingredients or contents; works consisting entirely of information that is common property containing no original authorship such as schedules of sporting events, height and weight charts, tape measures and rulers.

The reduction to tangible form in order to claim copyright protection is required, for both the Constitution and the Copyright Act and pertains only to "writings." This is a rather axiomatic requirement since nothing can be physically copied which is not beforehand reduced to tangible form.

ELIGIBLE MATERIALS AND NATURE OF PROTECTION

Section 4 of the Copyright Act enumerates 14 classifications of works in which copyright may be claimed. These classifications and the protections afforded each are as follows:

1. *Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.* The regulations include in this class such published works as fiction and nonfiction, poems, compilations, composite works, directories, catalogs, annual publications, information in tabular form, and similar textual matter, with or without illustrations, as books, either bound or in loose-leaf form, pamphlets, leaflets, cards, single pages or the like.

2. *Periodicals, including newspapers.* The regulations state that this class includes such works as newspapers, magazines, reviews, bulletins, and serial publications, published at intervals of less than a year. This class also includes newsletters and contributions to periodicals such as stories, cartoons, or columns published in magazines or newspapers.

3. *Lectures, sermons, addresses (prepared for oral delivery).* This class includes the scripts of unpublished works prepared in the first instance for oral delivery, such as lectures, sermons, addresses, monologs, panel discussions, and variety programs prepared for radio and television. However, formats, outlines, brochures, synopses, or general descriptions of radio and television programs are not registrable in unpublished form.

4. *Dramatic or dramatico—musical compositions:* This class includes published or unpublished works dramatic in nature such as acting versions of plays for stage, motion pictures, radio, television; operas, operettas, musical comedies and similar productions; pantomimes, choreographic works of a dramatic character (whether the story or theme be expressed by music and action combined or by actions alone.) Descriptions of dance steps and other physical gestures, including ballroom and social dances or choreographic works which do not tell a story, develop a character or emotion, or otherwise convey a dramatic concept or idea, are not included in this class.

5. *Musical compositions.* Included in this class are published or unpublished musical compositions in the form of visible notation (other than dramatico—musical compositions), with or without words, as well as new versions of musical compositions, such as adaptations or arrangements, and editing when such editing is the writing of an author. The words of a song, when unaccompanied by music, are not included in this class. A phonorecord, such as a disc, tape or other reproduction of a sound recording is not considered a "copy" of a musical composition.

6. *Maps.* Included are all published cartographic representations of area, such as terrestrial maps and such three-dimensional works as globes and relief models.

7. *Works of art; models or designs for works of art.* Included in this classification are published and unpublished works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as works belonging to the fine arts, such as paintings, drawings and sculpture.

8. *Reproductions of a work of art.* This includes published reproductions of existing works of art in the same or a different medium, such as lithograph, photoengraving, etching or drawing of a painting, sculpture or other work of art.

9. *Drawings or plastic works of a scientific or technical character.* This class includes published or unpublished two-dimensional drawings and three-dimensional molded or sculptured works, which have been designed for a scientific or technical use and which contain copyrightable graphic, pictorial, or sculptured material. Examples are mechanical drawings, astronomical charts, architect's blueprints and scale models, anatomical models, engineering diagrams and scale models, and statues of animals or plants used for scientific or educational purposes.

10. *Photographs.* These include published or unpublished photographic prints and filmstrips, slide films, and individual slides. However, photoengravings and other photomechanical reproductions of photographs are classified with the following rather than with photographs.

11. *Prints and pictorial illustrations including prints or labels used for articles of merchandise.* Included in this class are prints and pictorial illustrations, greeting cards, post cards and similar prints, produced by means of lithography, photoengraving or other methods of reproduction; a print or label which is not a trademark and which contains copyrightable matter, text, or both, published in connection with the sale or advertisement of an article or articles of merchandise.

12. *Motion-picture photoplays.* Included are published or unpublished motion pictures that are dramatic in character and tell a connected story: feature films, filmed, or recorded (including videotaped) television plays, short subject and animated cartoons, musical plays, and similar productions having plots.

13. *Motion pictures other than photoplays.* This includes published or unpublished nondramatic motion pictures and films such as newsreels, travelogs, nature studies, documentaries, training or promotional films, and filmed or recorded (including videotaped) television or nontheatrical programs having no plot.

14. *Sound recordings.* The regulations state that this class ". . . includes published sound recordings, i.e., works that result from the fixation of a series of musical, spoken, or other sounds. Common examples include recordings of music, drama, narration, or other sounds, as published in the form of phonorecords such as discs, tapes, cartridges, cassettes, player piano rolls, or similar material objects

from which the sounds can be reproduced either directly or with the aid of a machine or device." Sound tracks of motion pictures, and recorded renditions of musical compositions, literary or dramatic work are not included in this classification. Rather, they are included in classes 12 or 13, 5, 1 and 4, respectively.

INELIGIBLE MATERIALS

Not every work subject to reduction to tangible form is copyrightable. Works which either do not have a minimum amount of originality or are ideas in and of themselves, as distinguished from the particular manner in which they are express or described in writing, cannot be copyrighted. *Examples of unoriginal uncopyrightable works,* notwithstanding their novelty or distinctiveness, include words and short phrases and expressions such as names, titles, and slogans; familiar symbols or designs, mere variations of typographic ornamentation, lettering or coloring; mere lists of ingredients or contents; blank forms which are designed for recording information and do not themselves convey information such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, and order forms; works consisting entirely of information that is common property such as standard calendars, height and weight charts, tapemeasures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources.

Uncopyrightable ideas would include procedures for doing, making or building things; scientific or technical methods or discoveries; business operations or procedures; mathematical principles, formulas and equations, including devices based on them; devices and similar articles designed for computing and measuring such as slide rules, wheel dials and monograms; principles behind a blank form or similar work; any sort of concept, process, method of operation, or plan of action. Although not eligible for copyright protection, the particular idea or work may be protected by other laws, such as the law of patents or trademarks or tradenames.

DURATION, RENEWAL AND EXTENSION

The duration of copyright protection is 28 years commencing on the date of first publication, or, in the case of works registered in the Copyright Office in unpublished form, from date of registration.

The copyright can be renewed for an additional term of 28 years upon application and payment of a renewal fee within one year of expiration of the original term.

The owner of the copyright at the time of renewal registration may claim the renewal copyright if the copyrighted work is (a) a posthumous work, (b) a periodical, cyclopedic, or other composite work, (c) a work made for hire, or (d) a work copyrighted by a corporate body other than one assigned or licensed by the individual author. In all other situations only the following may claim the renewal copyright: the author, if living; the spouse or children, or both, of a deceased author; the executors of a deceased author if no spouse or children survive the author; a deceased

author's next of kin if no spouse or children survived and if the author left no will.

The rights accruing to an author by virtue of common law copyright are automatically terminated by publication of the work. The work then either becomes unprotected and enters the public domain or is protected by compliance with the copyright statute. The Register of Copyrights, under the direction and supervision of the Librarian of Congress, performs all duties relating to registration of copyrights. All records and other matters relating to copyright which are required to be preserved are kept in the Copyright Office, Library of Congress, Washington, D.C. The Copyright Office will perform searches of its records, indexes and deposits for such information as they may contain relative to copyright claims. The Copyright Office will not make comparisons of copyright deposits to determine similarity between works nor will it render advice with respect to the validity or status of any copyright (other than the facts shown in the office records), the sufficiency, extent or scope of compliance with copyright laws, or the rights of persons in cases of alleged infringement. It should be noted that copyright registration does not itself grant copyright protection. Instead, the right to protection is granted when in a self-executing manner the copyright owner complies with the statutory procedures.

PUBLICATION

Although the term "publication" is not defined in the Copyright Act, it is of critical importance, for publication without fulfilling certain statutory prerequisites can forever divest copyright protection for the work . . . Nimmer, Nimmer on Copyright, §49, P.149(1963) provides the following definition:

> ". . . [P]ublication occurs when by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner even if a sale or other such disposition does not in fact occur."

Publication is distribution of the work; merely, printing the work for future distribution is not publication. The scope of public distribution need not be broad. One court has held that the deposit of two copies of a copyrighted song in the Library of Congress, when coupled with an unrestricted sale of a single copy, without any effort to publish the work commercially, constituted a sufficient publication to sustain copyright. On the other hand, another court has held that the distribution of 2,000 copies of a copyrighted song to broadcasting stations was not a publication. Distribution of a work to a selected group or class for a limited purpose without right of diffusion, reproduction, distribution or sale, does not constitute a publication. One is well advised to seek the advice of an attorney if there are any doubts as to publication.

The essence of copyright is publication with notice. The required notice must contain either the word "Copyright", the abbreviation "Copr.", or the symbol "©", the name of the copyright owner or owners; and in the case of printed literary, musical, or dramatic work, the year in which the

copyright was secured by publication. If the work was previously registered in unpublished form, the notice should contain the year of registration, not publication. A notice of "all rights reserved" or similar words is not sufficient notice to obtain copyright rights.

An optional notice is permitted for maps, works of art (including models, designs and reproductions) drawings or plastic works of a scientific or technical character, photographs, and prints and pictorial illustrations (including prints or labels used for articles of merchandise) which allows use of the symbol "©" accompanied by the initials, monogram, mark, or symbol of the copyright owner if the name of the owner appears on some accessible portion of the copy or on the margin, back, permanent base, pedestal, or substance on which the copies are mounted.

In the case of reproductions of sound recordings, the required notice is the symbol "℗", the year of first publication, and the name of the copyright owner (or an abbreviation by which the name can be recognized or a generally known alternative designation of the owner).

For books and other publications printed in book form, the notice should be placed on the title page or the reverse side of the title page.

The notice on a musical composition should appear on the title page or the first page of music.

For motion pictures, the notice should appear on the title frame or near it.

In the case of periodicals, the notice should be placed either on the title page, the first page of text, or under the title heading.

For contributions to periodicals the notice should be placed on the first page of the contribution itself. One notice of copyright in each volume or in each number of a newspaper or periodical is sufficient.

The Copyright Office regulations contain a number of examples of defective notice, e.g., one of the elements of the notice is missing, the elements of the notice are so dispersed that a necessary element is not identified as a part of the notice; the notice is in a foreign language; the name is that of someone who had no authority to secure copyright in his name; the notice is on a detachable tag and will eventually be detached and discarded when the work is put in use; the notice is on the wrapper or container which is not a part of the work and which will eventually be removed and discarded when the work is put to use (the notice may be on a container which is designed and can be expected to remain with the work); the year date in the notice is later than the date of the year in which copyright was actually secured.

The registration procedure is the means by which copyright is perfected, for no action or proceeding may be maintained for infringement until registration has occurred. Some types of works may be registered without advance publication. These are: musical compositions, dramas, works of art, drawings and sculptured works of a scientific or technical character, photographs, motion pictures, and works prepared for oral delivery. Works which cannot be registered until publication with notice has occurred include books (including short stories, poems, and narrative outlines), prints, maps, reproductions of art, periodicals, commercial prints and labels, and sound recordings. While a copyright notice is not required to be affixed to an unpublished work, it is prudent to take that step.

Prepublication registration does not relieve one of the post-publication registration requirements once publication is effected.

The Copyright Act post-publication registration conditions require the filing of an appropriate application form and fee together with a copy or copies of the work or parts thereof. In the case of books, composite and cyclopedic works, directories, gazetteers, and other compilations, periodicals and newspapers, a "manufacturing" affidavit must also be submitted. The Copyright Act requires that all such works be printed and bound within the United States from type, plates, lithography or photoengraving done within the United States. An affidavit of the copyright owner or the printer attesting to this fact, together with the place and establishment where performed and the date of completion of the printing or date of publication must be filed for such works.

If the requisite copy or copies are not deposited with the application (and affidavit, if applicable), the Registrar can demand deposit and failure to comply within three months results in loss of the copyright.

FORM AND FEES

The following forms are currently supplied without charge by the Copyright Office:

Form A — Published book manufactured in the United States.

Form A-B — Ad Interim—Book or periodical in the English language manufactured and first published outside the United States.

Form A-B — Foreign—Book or periodical manufactured outside the United States (except work subject to the interim provisions of the Copyright Act).

Form B — Periodical manufactured in the United States.

Form BB — Contribution to a periodical manufactured in the United States.

Form C — Lecture or similar production prepared for oral delivery.

Form D — Dramatic or dramatico — musical composition.

Form E — Musical composition the author of which is a citizen or domiciliary of the United States or which was published in the United States.

Form E — Foreign—Musical composition the author of which is not a citizen or domiciliary of the United States and which was not first published in the United States.

Form F — Map

Form G — Work of art or a model or design for a work of art.

Form H — Reproduction of a work of art.

Form I — Drawing or plastic work of a scientific or technical character.

Form J — Photograph

Form K — Print or pictorial illustration.

Form KK — Print or label used for an article of merchandise.

Form LM — Motion picture

Form N — Sound recording

Form R — Renewal copyright

Form U — Notice of use of copyrighted music on mechanical instruments.

Applications for copyright registration covering published works should reflect the facts existing at the time of first publication, and should not include information concerning changes that have occurred between the time of publication and registration. The name given as copyright claimant in the application should agree with the name appearing in the copyright notice. Applications should be submitted by the copyright claimant. All information requested in the application should be given in the appropriate spaces provided. There should not be any attachments or continuation pages.

The Copyright Office currently charges the following fees: registration—$6 (includes certificate of registration); renewal—$4 (includes certificate of registration); additional certificate of registration—$2; certified copy of application—$2; all other certified copies—$3; recording assignment, agreement, power of attorney or other paper—six pages or less—$5—each additional page $.50; and recording notice of use—$3 ($.50 for each additional title in excess of five).

WHO MAY COPYRIGHT

The original copyright may only be obtained by the author or by the proprietor of the work or by his executors, administrators or assigns. Alien authors or proprietors cannot obtain U.S. copyright protection unless they are either domiciled in the United States at the time of first publication, or the country is a signatory to the University Copyright Convention or a similar agreement in which the United States has joined, or the country in which publication first occurred is a UCC signatory. Under the Copyright Act an author includes an employer in the case of works made for hire. In the absence of an agreement to the contrary, an employer is the author of a work even though created by the employee if the work was created within the scope of the employee's employment duties and the employer had the right under the employment relationship to direct and supervise the employee in the manner in which he accomplished such duties. If such an employment relationship does not exist, then the employee has the exclusive rights in the copyrighted work.

For example, employment of an individual to produce a work designated by the institution the acceptance of and payment for which work is subject to approval of the institution and which is produced by the individual under working condition mandated by the institution (such as regular office hours, etc.) would normally vest copyright rights in the institution. On the other hand, works by teaching faculty which are produced as an incident to or as a byproduct of their employment duties would generally vest copyrights in the faculty member. In between these two examples is the situation where a faculty member is the principal

investigator under a research grant to the institution where, typically, the manner in which the research is done is left substantially to the discretion of the faculty member. Institutional policies setting forth the respective rights of the institution and the faculty should alleviate the ambiguity inherent in most of typical situations which arise in connection with academic employment. Compare the principles of patent law, wherein the employee retains the right to the patent in the absence of an agreement to the contrary.

The Copyright Act declares that copyright rights may be assigned, granted or mortgaged by the holder provided that such transfer be by written instrument. A fundamental distinction exists between an assignment and a license as the former is the unlimited transfer of all the rights associated with the copyrighted work whereas the latter represents the transfer of something less than all such rights. An assignee can register a copyrighted work and prosecute infringement claims whereas a licensee cannot do so in his own name and must secure the active cooperation of the licensor. The respective rights of the parties should be enunciated in the written documents and thereby the determination may be made whether the transfer is an assignment or license. Merely because the document or documents are titled one or the other does not mean they are that. The respective aggregate contractual rights must be analyzed in each situation.

Any mortgage of a copyright should also comply with, and will be affected by, the property laws of the affected state or states, such as the Uniform Commercial Code and lien laws.

The Copyright Act requires that assignments be filed in the copyright office within three months of execution. A mortgage should likewise be filed by the mortgagee as failure to file an assignment or mortgage jeopardizes the assignee's or mortgagee's rights since an unrecorded transfer may be void as against a subsequent assignee or mortgagee whose assignment has been recorded prior to the former transferee.

The rights of a deceased copyright holder devolve in accordance with his will or, if no will is left, in accordance with the laws of intestacy of his domicile, just as any other property, real or personal, passes upon the death of the owner, regardless of whether such death occurs in the original copyright term or renewal term. Copyright rights also transfer to appropriate persons or entities upon dissolution of a business entity—copyright proprietor, but such transfer should be handled by assignment.

CONSEQUENCES OF COPYRIGHT

Copyrighted materials, or any part thereof, may of course be copied by others with permission of the copyright owner. The owner can usually be identified by the copyright notice. The Copyright Office will search its records to trace an owner for a fee of $5 an hour. For information about Copyright Office searches write to: Reference Division, Copyright Office, Library of Congress, Washington, D.C. 20540. The owner's written consent should be obtained after he has been advised in writing of the part of the work intended to be copied, the purpose of such use, the scope and media of intended distribution, and the royalty, if any, offered.

The property rights granted by copyright law do not constitute a complete monopoly for the use of the copyrighted work. In addition to certain

rights excepted by statute, the courts have engrafted another exception, known as the "fair use" doctrine, to the protection afforded by copyright. The doctrine can generally be defined as a privilege for persons other than the copyright owner to use the work in a reasonable manner without consent of the owner. The use must be for some fair and reasonable purpose and presupposes good faith and fair dealing. The underlying rationale for the "fair use" doctrine lies in the constitutional scheme of copyright, i.e., to promote the progress of science and the arts by allowing the free dissemination of ideas and the development of the arts, science and industry. The privilege has particularly been applied to scientific, historical, biographical and medical works for scientific, historical and educational purposes.

Whether the doctrine of "fair use" will protect one from an infringement claim depends upon all of the facts and circumstances of the particular case. If the doctrine is not available as a valid defense in a particular case, the mere acknowledgement of the source from which the copied work is taken will not protect one from an infringement claim.

EDUCATIONAL USE

There are few reported decisions involving educational use of copyrighted materials and the doctrine of fair use. In *McMillan v. King*, 223 Fed. 863 (D.C. Mass. 1914), an economics professor was enjoined from regularly distributing to his class copies of a synopsis of chapters of a copyrighted textbook even though the papers were eventually returned to the professor and destroyed. In *Withol v. Crow*, 309 F.2d 777 (8th Cir. 1962), a junior college music teacher was held to have infringed a copyrignted song by distributing to his class 48 copies of the song as arranged by him. In both of these cases the use was held not to be a fair use.

The leading fair use doctrine case is *The Williams and Wilkins Company v. United States*, 487 F.2d 1345 Ct. Cl. 1973, a case wherein the Commissioner to the Court of Claims held defendants' use to be clearly outside the boundaries of fair use, the U.S. Court of Claims held defendants' use to be permissible under the fair use doctrine, and the U.S. Supreme Court affirmed per curiam the U.S. Court of Claims by a vote of four to four. The plaintiff in this case published four medical journals which were subscribed to by defendant acting through the National Institute of Health and the National Library of Medicine. NIH regularly photocopied articles appearing in the journals for circulation among its research staff. NIH limited its photocopying for any individual staff member's request to a single article of no more than 40-50 pages. The requests from NIH personnel averaged about 127,000 a year. NLM provided one copy of journal articles, generally not to exceed 50 pages in length, free of charge on a no-return basis to other libraries and research institutions. NLM followed the general interlibrary loan code and limited requests from any individual to no more than 30 per month. NLM annually distributed about 930,000 photocopy pages of the journal's articles. The Commissioner to the Court of Claims concluded that the NIH and NLM practices were clearly outside the bounds of fair use. The Court of Claims, however, rejected the Commissioner's decision and held that the doctrine of fair use was a valid defense to the infringement claim.

The Court of Claims' decision was premised upon the following analysis: although the copying was extensive, the volume of use is only one of many factors to consider in determining fair use; the users were non-profit institutions solely devoted to disseminating and advancing medical science; the use was solely for scientific research purposes and copying was kept within prescribed limitations (the court analogized to the established legal right of a scholar to make one handwritten or typewritten copy for his scholarly use and characterized the practices as similar to a library providing a copying machine for use by its patrons); the publisher had failed to prove serious economic harm in that it failed to prove the journals would have been purchased by the ultimate users had the defendants not engaged in the practices complained of; medical science would be seriously harmed if the Court upheld plaintiff's contentions and, since the Court must accommodate the owner's financial interests to the public's right to the free dissemination of knowledge, the Court balanced the respective interests in favor of the public pending legislative action on the revised copyright law.

The validity of the fair use doctrine to a particular case will depend upon all of the facts and circumstances involved. However, the factors applicable can generally be stated as follows:

- the nature of the copyrighted work;
- the purpose and character of the use;
- the amount or substantiality, either quantitatively or qualitatively, of the copyrighted work as a whole;
- the degree to which the use adversely affects the copyright owner's sales, diminishes his profits, or otherwise supersedes the objects, and therefore the value, of the original work;
- the copyright owner's interests are balanced with the public's superior interests in the promotion of science and art and the dissemination of knowledge.

Making a single copy for individual scholarly use is generally acceptable. Making multiple copies for distribution to others raises the types of problems for which the fair use doctrine is intended to resolve. Difficult issues are ever present, especially given current technology. For instance, the Columbia Broadcasting System has sued Vanderbilt University for infringement based upon the University's practice of taping the CBS Evening News for use in its archives. CBS was particularly concerned with the editing done by Vanderbilt University.

A claim for infringement must be initiated within three years of the alleged infringing act. The party whose copyright is infringed is entitled to either the loss or dimunition in value of his copyright, or the lost profits as proven by the infringer's sales, or statutory "in lieu" damages ranging from $1 to $5,000, depending upon the type of copyrighted work. In addition, attorneys fees may be recoverable in some instances and injunctive relief is available, including requiring infringing copies and plates to be destroyed. Criminal penalties provided under the Copyright Act include a $100 fine for selling or issuing an uncopyrighted work bearing a copyright notice, a fine of from $100 to $1,000 for the

fraudulent insertion of a copyright notice or the fraudulent removal of a valid copyright notice, a fine of between $100 and $1,000 and/or up to one year imprisonment for willfully, and for profit, infringing the copyright of another, and a fine of up to $1,000 and forfeiture of copyright for making a false affidavit of domestic manufacture.

INSTITUTIONAL COPYRIGHT POLICIES

Academic institutions naturally beget and employ copyrightable materials to a substantial extent. Technological developments have generated more and more complex copyright situations involving the joint enterprise of numerous people and the facilities of multiple institutions. For these reasons, and because there often can be substantial outlays of direct and indirect costs as well as substantial royalties involved, an academic institution is well advised to develop a policy on copyright materials.

An institutional policy on these matters should define the scope of its coverage. This can be done by describing the types of materials to which it applies. A policy should also provide for an equitable distribution of the mutual rights (including royalties) and obligations of the parties. Such a distribution will vary depending upon the degree of involvement of the individual faculty and staff, the use of institutional facilities, the participation of outside sponsors, and whether the work was produced on the initiative of the individual rather than required as part of his or her job duties. Any policy would generally be subject to the terms of a grant or sponsor's contract and the variance from the policy should be considered when negotiating or accepting a grant.

The development of a policy itself can give rise to other problems, such as considerations of academic freedom, faculty rights and obligations as traditionally applied or as contained in a collective bargaining agreement. An institutional copyright policy cannot answer all the questions which will arise with respect to what often are complex copyright problems and the equitable solution thereof. A policy can, however, provide uniform general rules and administrative procedures which will assist the institution in the orderly and equitable solution to the problems posed in a particular situation.

Royalties received by a copyright holder are taxable as ordinary income (assuming, of course, that the copyright holder is not a tax exempt entity). The author of a copyrighted work cannot treat the sale of the copyright as the sale of a capital asset. The gain on the sale by an author is therefore taxed as ordinary income. A copyright held and subsequently sold by one who is not the author of the work can be treated as the sale of a capital asset and therefore taxed at the more favorable capital gains rate. An exclusive license can often be considered as a sale depending upon the rights retained by the licensor. The costs of acquiring a copyright, when held by one not an author, can be depreciated over the useful life of the copyright. The statutory period of 28 years may be used for purposes of depreciation.

A copyright is taxable upon devolution by death. Whether or not a tax will be imposed under the federal estate tax and state inheritance tax will depend upon the size of the deceased copyright holder's estate and the valuation of the copyright.

PROPOSED COPYRIGHT LAW REVISION

Congress has had before it for its consideration over the last decade a number of bills which would substantially amend the Copyright Act of 1909. In September, 1974, the Senate passed a major copyright revision bill (S1361, 93rd Cong., 1st Sess). The House held hearings in May and June, 1975, on its version of the Senate bill (H.R. 2223, 93rd Cong., 1st Sess). It is reported that a new law will probably be enacted within a year.

Some of the major debate with respect to the bills centers on the provisions dealing with fair use and reproduction by libraries and archives. There are a number of other provisions relating to educational activities and any bill ultimately enacted should be scrutinized for such provisions.

Section 107 of the Senate bill codifies the judicial decisions on fair use by providing that

> . . . the fair use of a copyrighted work . . . for purposes such as . . . teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:
>
> (1) the purpose and character of the use;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The Senate Judiciary Committee Report, S. Rep. No. 983, 93rd Cong. 2) (1974), explains in some detail each of the four factors with particular reference to the educational environment.

Section 108 of the Senate bill declares that it is not infringement for a library or archive to reproduce one copy of a work, or a part thereof, under certain circumstances and for enumerated purposes. This section, however, clearly provides that reproduction of multiple copies and systematic reproduction of single copies constitute infringement. Whether or not these provisions, and others, of the Senate version will remain in the House bill and final act, if any, is a matter of speculation at this time.

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Chapter IV

Disputes Settlements— Grievance and Arbitration Procedures

A. Lee Belcher

Grievance procedures, with appeal provisions to various levels of administrative management, and often to a neutral third party as the final step, are found in more than 98 percent of all negotiated agreements. Such procedures are also rapidly being adopted for nonunionized faculty and classified employees, as well as for administrative and nonteaching professional personnel. The prospects of gaining a grievance procedure where none has been voluntarily adopted by the college is one of the most attractive and persuasive union recruiting promises. Consequently, a grievance procedure is always included in the original union demands after a group has become unionized. An equally compelling reason for a college to adopt a sound appeal process derives from the affirmative action plans designed to assure fair and equitable treatment of all employees.

OBJECTIVES IN DEVELOPING PROCEDURES

In developing and implementing a grievance procedure, one should be appreciative of the resulting additional responsibilities placed on supervisory and administrative staff and the highly emotional impact the occasional reversals of managerial decisions will have on supervision.

It is essential that the need for a grievance procedure is well understood by all levels of management. The following are six examples of specific objectives that a sound plan should help achieve:

1. More consistent and uniform administration of personnel policies and/or union agreement, thus minimizing employee discontent.
2. Improved employee-management communications. A grievance can be a valuable form of upward communications, and the supervisor's response provides an excellent opportunity to clarify and explain policies.
3. Create a sense of fairness through an opportunity for employees to be heard; a high-priority need for everyone.
4. Provide an orderly means to resolve problems, correct misunderstandings, reduce employee frustration, and minimize employee turnover.

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5. Identify potential problem areas and furnish greater management insight into:
   a. Employees' personal needs and the nature of complaints.
   b. Conflicting pressures often being felt by first-level supervision.
6. Satisfy legal requirements in some states.

FREQUENT SUBJECTS OF GRIEVANCES

A. *Definitions:* The grievance procedure should clearly define the types of complaints which are reviewable and which may be appealed to the final step. The conventional wording reads somewhat as follows:

> *Grievance as used in this agreement is limited to a complaint or request of an employee which involves the interpretation or application of, or compliance with, the provisions of this agreement.*

An example of a much broader definition, and one not normally recommended because it is unusually open-ended provides:

> *The college recognizes the right of employees to seek a solution concerning disagreements arising from working relationships, working conditions, employment practices, or differences of interpretation of policy which might arise between the college and its employees.*

B. *Grievable Complaints—Classified Employees:* A comprehensive itemization of grievable subjects would be quite lengthy, but studies have indicated the following categories are among the most frequently processed by nonacademic (classified) employees.
   1. Discharge and discipline (including suspensions and written reprimands).
   2. Seniority, as applied to:
      a.) Work assignments
      b.) Promotions
      c.) Layoffs
      d.) Overtime
   3. Wages and proper job classifications.
   4. Work rules and past practices.
   5. Discrimination (e.g., sex, color, race, age, religion, or national origin).
   6. Holidays, vacation, sick leave benefits.

C. *Grievable Issues—Certificated Personnel:* The faculties and other professionals identify somewhat different matters about which they grieve, largely because of the nature of their work, personnel policies, and the subjects covered in negotiated agreements. The following are typical of complaints which have been appealed to arbitration by faculty:

1. Denial of reappointment.
2. Salaries (e.g., credit for academic preparation or service credit; equal pay).
3. Promotion in rank.
4. Pay for time not worked (e.g., personal leave, emergency campus closings).
5. Reprimands or discipline for nonprofessional conduct.
6. Procedural defects and deviations (e.g., required evaluation and counseling).
7. Discrimination.
8. Assignments and/or pay for special activities, overloads, summer teaching.
9. Sabbatical leaves.
10. Other leaves, including maternity or personal leaves.
11. Working conditions.

TYPICAL GRIEVANCE PROCEDURE

A. *Basic Elements:* It would be unwise to blindly adopt verbatim the language of someone else's procedure without carefully examining it and making appropriate modifications. Nevertheless, one can gain substantial insight into the format and the essential elements of workable procedure by studying several models. The following are only intended as examples of the components:

1. Purpose.
2. Definitions
3. Exclusions.
4. Eligibility to initiate grievance.
5. Appeal steps-usually three or four.[1]
6. Maximum time allowed for appeal actions and responses—with right of waiver.
7. Circumstances when bypassing steps may be permitted.
8. Pay and time allowed for investigating and other grievance activities.
9. Protection against reprisals.
10. Details for invoking and implementing arbitration step.

B. *Grievance Form:* Grievance forms are usually quite simple and will generally include space for the following information: (See Figures 1 and 2).

1. Grievant's name.
2. Job title.
3. Department in which employed.

4. Immediate supervisor and date orally discussed.
5. Explanation of grievance.
6. Identification of specific policy or contract section allegedly violated.
7. The desired adjustment.
8. Date signed, and date filed.

There may also be spaces for signature by a union representative and a section(s) for the answer to the complaint by management.

Figure 1

REQUEST FOR ADJUSTMENT OF GRIEVANCE

Name_____ Department _____

Job Title_____ Name of Supervisor _____

DESCRIPTION OF GRIEVANCE: (Describe all facts of the situation including date, time, place of occurance, etc. Use reverse side if necessary).

_____

_____

_____

_____

_____

Give specific University policies and practices believed to have been improperly applied, misinterpreted or violated: _____

_____

_____

_____

Specific corrective action desired: _____

_____

_____

_____

Employee Signature_____ Date _____

Date filed in Personnel Office_____

Figure 2

LOCAL UNION GRIEVANCE FORM

Employee's Name	Department	Job Title	Date

NATURE OF GRIEVANCE

INSTRUCTIONS: State exactly — What happened; When did it happen; Where did it happen; Why did it happen—

_____

_____

_____

Section of Labor Agreement Affected _____

Settlement requested in Grievance _____

_____

_____ (and/or) _____

Employee Signature Union Representative

Management's Answer: Date_____ 19 ____

_____

_____

_____

_____

College Representative

ROLE OF EMPLOYEE REPRESENTATIVE

A. *Right to Representation:* The employee should be allowed to have another person assist or represent him/her in drafting and processing a grievance, if the person so desires. If the group is represented by a union, it would be expected that the shop steward or the union's business manager would serve as the individual's advocate. (For faculties, the union representative may be referred to as a chapter chairperson or representative of the association.)

If the group is not unionized, the person may choose a fellow employee, an attorney, or a friend to speak for him or her. Usually, there are few or no restrictions placed on a person's choice of his/her representative.

B. *Supervisor's Reaction:* For supervisors inexperienced in relating to employee or union representatives, the role may be a disconcerting one and to some extent threatening in the beginning. For this reason, a training seminar is recommended for the first-line and middle management in order to acquaint them with the rights and restrictions on employee representatives.

C. *Investigation of Facts:* The generally accepted principles of rights and restrictions may be summarized in these brief observations:

1. The employee or his/her representative has the right to investigate, inquire, and determine facts without interference, coercion, harrassment, or threat of retaliation.
2. There is no requirement that the investigation be carried out on college time unless the college has agreed to allow it in negotiations, or it is an established college policy.
3. The employee and/or the representative has no "right" to interfere with the work being performed by other employees unless this has been agreed to by the college.
4. Even if the group is covered by a union agreement, most state and federal labor-relations laws stipulate that the individual employee may seek to resolve a grievance without the involvement of a union representative providing:
   a.) The union has been given opportunity to be present at the time of a settlement, and
   b.) The settlement is not inconsistent with the terms of a negotiated agreement.

GRIEVANCE MEETINGS—INFORMAL HEARINGS

A. *Participants:*

1. The initial discussion of the grievance is normally with the employee's immediate supervisor and is informal. Informality would also be expected in the discussions at the next step or two. However, at one of the more advance steps, a union grievance committee of three to five people may meet with management's representative in a joint effort to resolve the dispute. This is particularly true when an industrial-type union represents the "blue-collar" employees. In these meetings, there is a degree of exchanging "facts," mediation, and bargaining, with a compromise solution a possibility.
2. At these meetings, one should expect the grievant to attend, together with the union representative, and possibly one or more witnesses on his/her behalf. For the college, there would probably be

the immediate supervisor and perhaps a higher level management person, along with the director of employee relations (or personnel) and possibly one or more witnesses.

3. If the grievant is a faculty member, there may be a "hearing" by a peer committee leading to a recommendation to a higher administrator. In these cases, there may be no effort to "negotiate" a settlement between the grievant and the college, but will be more of a fact-finding process.

B. *Procedures:*

1. Meetings may be held in a conference room on campus and are generally on college time, although this is a negotiable issue. It is strongly recommended that there be no media representatives present. (Most "sunshine" laws exempt such discussions from the "open meetings" requirements.)

2. Each side is expected to have a single spokesman although others may speak when appropriate. However, it is *important* that the college's team avoid damaging confusion and the possibility of contradiction by team members talking at the "wrong" time. For this reason, the college spokesman needs to coordinate the team's presentation of facts, arguments, and rebuttal statements.

3. Scheduling of the meeting should be as promptly as possible in order to cultivate a favorable relationship with the employees. And this will usually be necessary in order to comply with the time frame for responding to grievances as prescribed in the union agreement or college policy statement.

ARBITRATION PROCEEDINGS

A. *Evaluating Options:* Perhaps no more than five to ten percent of all grievances will be processed to the final step which is often an arbitration hearing before a neutral "third" person. Arbitration is not a procedure to be resorted to without weighing carefully the alternatives, nor is it an experience which should create undue anxiety. Before abandoning all other efforts to resolve the controversy, one should ask:

1. Is the issue sufficiently important to justify the time, effort, and expense of arbitration?

2. What are the probable long-term effects of either winning or losing the case?

3. What practical solutions, if any, short of arbitration, are possible?

B. *"Rights" vs. "Interest" Arbitration:* Arbitration under the grievance procedure should be limited to *"rights"* disputes, i.e., those alleging a violation of an established right the employee enjoys. This is a different concept from *"interest"* arbitration, a procedure for disposing of bargainable issues which are unresolved in negotiations as a result of the parties having reached an impasse in their bargaining sessions.

C. *Arbitral Issues:* Controversies can arise as to whether a complaint is an arbitral issue and whether it has been filed or appealed in a timely manner. If these challenges have been raised the arbitrator will not address the issue of grievance until he/she has decided on the technical questions. (The testimony and arguments on the main issue of the grievance, as well as the challenges, are usually presented at one hearing rather than deferring the substantive matter until later.)

D. *Single Arbitrator or a Panel:* Some grievance procedures authorize the decision by a single arbitrator whereas others call for a three-person arbitration panel with each party naming one member and these two selecting a neutral as the chairperson and third member.

E. *Advisory or Binding Arbitration:*

1. In drafting the procedure, it must be decided whether the arbitrator's award is to be "final and binding" on the grievant, the union, and the college without further appeal; or, whether the decision is only to be advisory to the president or chancellor. In some states, there are legal prohibitions against arbitration that is binding on public employers, but in the absence of statutory restrictions, unions will negotiate hard for binding arbitration in the form characteristic of industrial labor contracts.

2. If the procedure calls for binding arbitration, courts[2] have held that an award, in the absence of fraud, is enforceable unless it can be demonstrated that the arbitrator has exceeded his/her authority.

F. *Selection of Arbitrator:*

1. A professional labor arbitrator should be chosen for the neutral's role. The American Arbitration Association and the Federal Mediation and Conciliation Service maintain rosters of approved arbitrators (by geographical areas), and on request either organization will furnish information on a panel of five or seven names, showing their fees and giving biographical data, from which the parties may make a selection.

2. The conventional selection method is for the college and the grievant's representative to alternately scratch a name from the list until only one name remains. That person is then invited to serve as the arbitrator. There is an advantage for the college to let the union be first to scratch a name, but because most experienced union representatives are usually aware of this, they will decline. The parties more often will flip a coin to determine which will scratch the first name from the list.

G. *Authority of Arbitrator:*

1. The limitations on the authority of the arbitrator should be established by the terms of the grievance procedure and by the wording of the employee's grievance. The arbitrator should be specifically denied any authority to add to, take away from, change,

or modify the terms of the agreement or college policies. Instead, the arbitrator should be limited to deciding whether there has been a proper interpretation or application of an existing agreement or policy. This would generally include questions of discipline or discharge for cause.

2. In disciplinary and discharge cases, the range of remedies available to the arbitrator will be from denying entirely the grievant's charge to that of sustaining fully the grievant's position—with compromises in between. In the case of terminated employment, the arbitrator may uphold discharge if it is determined to have been for proper cause, or go to the other extreme and direct full reinstatement and the employee made whole for all loss of earnings and with no loss of seniority or other benefits. Within these extremes, the arbitrator may find discharge was too severe a penalty for the offense after considering extenuating circumstances and may direct reemployment but with either partial or no back pay for the time lost. There can be many variations of these compromise directives fashioned by the arbitrator.

H. *Record of Proceedings:* The arbitration proceedings are designed to provide due process for the grievant in a quasi-judicial yet rather informal hearing. At the request and expense of either or both parties a stenographic record will be made. Otherwise, the arbitrator may personally tape-record the proceedings for his exclusive use or he/she may simply take extensive hand-written notes.

I. *Arbitration Expenses:* The parties are expected to pay their own expenses in connection with preparing and presenting their case. However, it is customary for the grievance procedure to stipulate that the arbitrator's fee and traveling expenses, etc., will be shared equally by the union (or grievant) and the college. For the average case, the arbitrator's billing for a one-day hearing and two or three days time to study the case and write the opinion, will range from $500 to $1,000.

If both parties wish copies of the stenographic record, this expense is also shared and the cost may run from $200 to $350. If only one party orders the record, that party pays the full amount. In either situation, the arbitrator is furnished with a copy.

J. *Attorney's Assistance:*

1. The college should seek legal advice, whenever a grievance progresses toward the arbitration step, and it is better to err on the side of seeking guidance prematurely rather than too late. As in so many aspects of employee relations, it requires far less time and expense to handle problems properly the first time than to unravel a series of compounding errors.

2. This does not suggest that a lawyer should always present the college's case in arbitration. If the union or grievant retains counsel, then the college should do so unless the employee relations office is

staffed with a person of considerable experience. On the other hand, if the college routinely is represented by an attorney in arbitration cases, the average individual employee (not represented by a union) will be reluctant to assume the rather substantial expense of hiring a lawyer, thus frustrating the full use of the grievance procedure.

K. *Hearing Procedures:* The accepted guidelines for arbitration do not require strict compliance with the rules of evidence or court room procedures. However, the hearings will generally follow these lines:

1. The parties may jointly submit a summary of the issue. Otherwise, the ultimate question will be framed by the arbitrator after the case has been heard.
2. Evidentiary documents may be jointly introduced, such as a copy of the union agreement or college policy statement; and copies of the original grievance, the appeal notices, and management's replies are often joint exhibits.
3. There may be a stipulation of agreed-upon facts so as to eliminate the need for time-consuming introduction of the material facts into the record.
4. The arbitrator may presume all witnesses are to be sworn, or the parties may be asked what their preference is. Frequently, the parties will agree to dispense with the oath.
5. Each party may be given an opportunity to briefly state its position in an opening statement so that the arbitrator is better able to understand the nature of the issue.
6. If it is a discharge or disciplinary grievance, the college will be expected to go forward (present its evidence) first. In disputes alleging a misinterpretation or misapplication of a policy or benefit, the union or the employee goes forward first.
7. The witnesses take their turn and are first questioned (direct examination) by the counsel or representative of the side which has called them, after which the witnesses may be questioned (cross-examination) by the opposing counsel. There may be further questioning alternately by both sides (redirect and recross examination). Also, the arbitrator is free to clarify any uncertain points by questioning the witnesses before they are excused.
8. Although the hearings are somewhat informal and not governed by the legal regulation of proof and persuasion, there are times when counsel will challenge the propriety of leading questions, argumentative questions, hearsay testimony, and opinion questions which go to the heart of the issue to be decided by the arbitrator.
9. Either party may have documentary evidence which it wishes the arbitrator to consider. These materials are introduced after a witness has identified the nature of the documents, pictures, and established the authenticity and relevancy of the evidence. The

opposing party may object to the arbitrator receiving them in which case the arbitrator must decide either to sustain or overrule the objections.

10. At the conclusion of the hearing, the arbitrator will give counsel for each side an opportunity to summarize its position on the matter or to file post-hearing briefs. Attorneys usually prefer to summarize their arguments in briefs, especially so when they feel a need for quoting from the stenographic record. In addition to citing supporting testimony and evidence, counsel may seek to reenforce arguments by quoting from published opinions of other arbitrators who have decided similar questions.

L. *Research Similar Cases:* During the past 30 years, a large number of arbitration cases have been published[3] in full text. These cover almost every type of dispute that is apt to arise on campus. A study of the arguments presented by each side in a representative sampling of earlier cases dealing with a given topic, together with a review of the evaluation of the facts by various arbitrators, will prove to be an excellent source of ideas when preparing for an arbitration hearing. And the cases may be useful in training supervision in their handling of grievances at the lower steps.

M. *Preparation for Hearing:* Other matters to be considered in preparation of an arbitration hearing are

1. Choice of a mutually convenient date, time, and place for the hearing.
2. Selection of documentary evidence (Three copies will be required of all printed materials, etc., which may be introduced.)
3. Interviewing witnesses and explaining the purpose of and procedures to be followed at the hearing.

N. *Common Mistakes:*

1. Failure to prepare adequately is probably the most serious of the frequently observed mistakes made by colleges. Included in this "fault" is the neglect to fully anticipate the grievant's supporting testimony and evidence. Mixed into this problem is the unfortunate experience of having unfavorable and previously unknown facts unexpectedly come to light during the hearing, and then being unprepared to effectively respond.
2. Other regrettable errors in judgment by the college representative may be a determination by some persons to "win" at all costs, and a propensity to embarrass the grievant or union by heckling or sardonic questioning. An arbitration hearing is only one episode in a long-continuing relationship and not an ad hoc litigation between parties who may never again see each other. Employees and union officers often feel outmatched in arbitration and are sensitive to any unnecessary harassment and embarrassment. Their memories are long when there have been personal affronts, and many favorable arbitration awards have been achieved at a very high price, to

be paid in revengeful "installments" over a long period in the future.

O. *Arbitrator's Decision:*

1. The established rules provide that the arbitrator will write his *Opinion and Award* no later than 30 days after the hearing or final briefs have been received. Unfortunately, there are frequent violations of this commitment. Some arbitrators do not render their decisions for three to four months, sometimes longer.

2. The decision may be as short as five or as long as 25 typed pages. The most common format will include the following sections:

   a.) The parties will be identified.

   b.) The issue in dispute will be stated in a sentence or two.

   c.) The history of the case and the relevant facts will be summarized.

   d.) The pertinent section of the agreement or college personnel policy will be quoted.

   e.) The contentions of the parties will be set forth in separate, abridged statements.

   f.) The arbitrator's reasoning and rationale for his decision will be explained.

   g.) The award will be stated at the conclusion. It may be a short sentence or perhaps a paragraph or two. The grievance may be denied or sustained, and if sustained, the arbitrator will spell out what the remedy is to be.

CRITERIA OFTEN CITED BY ARBITRATORS

The above discussion of the mechanics of the arbitration process is intended primarily to encourage sound supervisory practices which will aid in resolving grievances before the complaints reach the arbitration step, and help to increase the probabilities that the arbitrator will find for the college if the issue is arbitrated. Accordingly, it is urged that the section on arbitration be studied for guidance in handling of the grievance at the lower steps, as well as at the final step.

A. *In Discharge and Discipline Cases:* The following guidelines have been cited in numerous cases:

1. Was the alleged violation of the college's rule or policy one that was known to the employee?

2. Was the rule or policy reasonable as related to the efficient and safe operations of the job?

3. Did the employee have knowledge of possible or probable disciplinary consequences of his/her conduct?

4. Did supervision investigate fairly and objectively the facts before administering discipline?

5. Has supervision previously applied the rules or policies, and the discipline, evenhandedly and without discrimination?
6. Was the severity of the discipline reasonable in light of the offense and the employee's past employment record with the college?
7. Has the concept of progressive discipline been applied where appropriate?

B. *Alleged Violations of Contract Terms or College Policies: (Questions of Interpretation or Application.)* These questions are to determine the justification of the employee's complaint:

1. Is the language clear and unambiguous?
2. What is the history of the policy?
3. What was the intent of past revisions? Or of proposals in negotiations for changes which were adopted or rejected?
4. What has been the interpretation or application as reflected by past practices?
5. Do other policies or contract provisions also apply?
6. What is the effect of applicable state or federal laws or civil service regulations?

OTHER APPEAL SYSTEMS

A. *Alternative Forums:* Seldom is the grievance procedure the only recourse available to an aggrieved employee. Other appeal forums may have been established internally by the college or by state or federal statutes. For example:

1. Appeals under a merit or civil service system.
2. Appeals under a grievance procedure included in an affirmative action plan.
3. Investigations and enforcement procedures of civil rights and equal pay laws or regulations.
4. Appeal rights under a job classification plan.
5. Tenure and promotion appeals system (i.e., as provided by college policies or state laws).
6. State or federal labor board investigation and resolution of unfair labor practice charges (improper practices).

B. *Significance:* The prospects of two or more investigations, hearings, and contradictory decisions dictate both sound supervisory practices and efficient processing of grievances through all steps. Where grievances have been properly handled, with adequate procedural safeguards for the grievant, the chances of avoiding duplication or unfavorable rulings are enhanced.

OPTIONAL FORMAL HEARINGS

While union negotiators will seek arbitration as the terminal step of an appeal procedure, this is not the only means whereby a formal hearing may be provided. An alternative found useful for nonunionized groups is an "in-house" hearing conducted very much as an arbitration proceeding except that the hearing officer or panel will not be from outside the institution. Instead, the president or governing board may designate a disinterested administrator or faculty member (with or without the approval of the grievant) to conduct the hearing and submit findings of fact and recommendations. Or, a panel consisting of three to five persons may be jointly chosen from among the faculty or staff by the grievant and department administration to serve as a "jury" to hear the testimony and arguments and evaluate the evidence. One of the panel members will serve as chairperson and may rule on procedural questions that arise. However, the chairperson is often inexperienced in the normal procedures to be followed and may need guidance. Inasmuch as an understanding of legal objections is often outside the panel's field of training, the conventional rules of evidence are seldom adhered to, but one has the comfort of knowing that the average panel is sincere in seeking to determine the truth and to be fair.

IMPORTANCE OF SUPERVISORS

A. *Supervisors' Concerns:* Most grievances allege that supervision has erred in some action or decision affecting the employee(s) who have filed the complaint. And in those instances when it is determined that the employee's position should be supported (experience indicates approximately 30 percent of the cases), supervision may view the reversal as an unfavorable reflection on his/her capabilities. This evaluation is not necessarily justified, but, in any event, one should seek to keep the number of grievances to a practical minimum and process each complaint in a thorough and proper manner in order to reduce the probability of supervision being overruled because of inadequate organization of facts or procedural irregularities rather than on the substantive issue.

B. *Training Suggestions:* The following suggests relevant training subjects found to be essential to effective supervision.

1. An in-depth knowledge of college's personnel policies and rules, and the union agreement, if any.
2. An understanding of objectives and steps of the grievance procedure.
3. A recognition and mature acceptance of the role of employee representative, shop steward, etc.
4. Recognition of the importance of remaining calm in discussing the merits of grievances without personal accusations that tend to trigger bitter recrimination or defensive self justification.
5. Needed maturity and emotional preparation to accept with humility those occasions when he/she is overruled by higher

management, by an arbitrator or an outside agency. This is often a rather difficult experience for supervisors or middle management.[4]

6. A knowledge of, and an appreciation for, the need to follow the nine basic steps in investigating a grievance.

   a.) Interview the employee to determine the exact nature of the grievance.

   b.) Study the relevant university policies or union contract clauses.

   c.) Determine what the administration's interpretation is of the policies or clauses.

   d.) Interview other employees, supervisors, or personnel office to determine how the policies or clauses have been applied previously (past practice).

   e.) If employees are represented by a union, talk to the shop steward or business manager to ascertain his/her position on the matter.

   f.) Review all relevant records and documents for meaningful facts.

   g.) Determine if the same issue has been the cause of an earlier grievance. If so, determine how the matter was resolved.

   h.) Review other college personnel policies or sections of the union contract to see if there are other policies or clauses that either support, or fail to support, the position of supervision.

   i.) Determine if all procedural requirements have been met.

GRIEVANCES FROM FACULTY

Court decisions and the "case law" guidelines merit continuing study for insight into the drafting of contractual clauses and policy statements.

A. *Peer Judgments:* Among the more troublesome grievances are those related to promotion, nonreappointment, and salaries which have been determined largely by the recommendations of the grievant's peers.

B. *Academic Judgments:* A second contributing factor in difficult cases are those administrative decisions based on academic judgment. Accordingly, it is recommended that the grievance procedures explicitly exclude all grievances challenging decisions concerning tenure, promotion, etc., based on judgment of academic qualifications.

C. *Procedural Defects:* Closely related to the grievances described in the two previous paragraphs are those complaints alleging failure to comply with procedural obligations associated with granting of tenure, promotion, and salary increases. Examples: Timely performance evaluations, counseling on needed improvements, access to

documents in personnel file, timeliness of notice of nonreappointment.

D. *Conflicting Status—Faculty or Administrator:* In higher education, there is an imprecise concept of who is "management." Are the department chairpersons a part of the faculty or are they "first-line" administrators who should make the original response to a grievance? If there is to be a representation election, the status of chairpersons (i.e., either in or out of the bargaining unit) will be determined as well as the status of assistant and associate deans, and perhaps that of other professionals such as librarians, counselors, and registrars. And from these determinations, those having responsibilities for handling of grievances will be identified.

E. *Liberty and Property Rights:* Although the U.S. Supreme Court[5] has established fundamental principles which have a direct bearing on the disposition of certain types of faculty complaints alleging infringement of constitutional rights under the First and Fourteenth Amendments, one needs to keep current on subsequent court cases which elaborate on these rights and the obligations of the institution. These principles relate to rights of hearings etc., when, for example, the basis for the nonreappointment of a nontenured faculty member threatens to seriously damage his/her professional standing or associations in the community (e.g., charges of personal dishonesty or immorality). Moreover, due process hearings may be indicated when the grievant alleges the nonrenewal of his/her contract was motivated by legally impermissible reasons, e.g., the exercise of freedom of speech or assembly.

GRIEVANCE DATA ACCUMULATION

A. *Value of Studies:* It is important that the administration have the benefit of a continuing analysis of grievances, and this assignment should be a responsibility of the executive responsible for the faculty-staff relations. The revelations from the data may call attention to:

1. Ambiguous policy or contract language.
2. Weaknesses of individual supervisory or administrative personnel.
3. Identifiable training needs.
4. The information gained will be essential in the rewriting of policies and in anticipating either union or management proposals in subsequent negotiations.

B. *Information Needed:* In maintaining the grievance data files, one should retain notes of the circumstances surrounding each grievance, including the contentions of the grievant or union, and management's explanation for the position it has taken.

C. *Log of Questions and Answers:* Also of substantial value will be a log of questions that have been raised (though not necessarily as a grievance) concerning personnel policies and the interpretations given in

reply. Some unusual situations occur only very infrequently, perhaps once a year. The log will serve to refresh one's memory of how a similar problem was handled earlier and thus help establish maximum consistency in the administration of personnel matters.

Footnotes

1. In a sampling of union contracts, it was found that 47 percent have three steps and 26 percent have four steps.

2. 46 LRRM 2414, 2416 and 2423.

3. Three of the major labor reporting services are American Arbitration Association, *Labor Arbitration In Schools* (New York), Bureau of National Affairs, Inc., *Labor Arbitration Reports* (Washington, D.C.), Commerce Clearing House, Inc., *Labor Arbitration Awards* (Chicago).

4. Settlements by the university would be guaranteed to infuriate chairmen and departments that were reversed. However, careful explanation of the defects discovered in the faculty process should lead to improvement and to a reduction both in the number of grievances and in the number of reversals." (*The Arbitration Journal*, March 1974).

5. *Board of Regents v. Roth*, 408 US 564 (1972) and *Perry v Sindermann*, 408 US 593 (1972).

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Chapter V

Dealing with Federal Regulatory Agencies

Victor G. Rosenblum

The vast increase in recent years in efforts by federal agencies to regulate college policies and practices is final proof that the era of "splendid isolation" of our colleges is over. Regulatory actions by federal agencies have multiplied, along with the heightening of judicial intervention into campus affairs, at the behest of disgruntled students or staff members and as an inevitable consequence of expanding government grants or contracts. Like it or not, today's college administrators must recognize that courts and administrative agencies have profound impacts upon policies, relationships, rules, and finances within their institutions.

Three major sets of factors have established the contexts for the burgeoning of federal regulatory activities in relation to higher education.

First, over the years, the courts have extended—gradually but steadily —the constitutional rights students may invoke against practices and procedures of school officials. Due process and equal protection guarantees must be observed by state supported institutions or they will face the peril of reversal by the courts and possible assessment of damages in favor of complainants. Discrimination because of race, religion, ethnicity, sex, age, or other attributes unrelated to competence have been clearly declared illegal, and fair procedures must be utilized in such basic areas as admissions, suspensions, and expulsions.

In *Healy v. James,* 408 U.S. 169 (1972), for example, the Supreme Court overruled a college's ban of Students for A Democratic Society chapter from its campus because college officials sought to place the burden of proof on the allegedly subversive student organization to show that it would not fail to comply with proper school regulations.

The justices ruled in *Goss v. Lopez,* 43 *Law Week* 4181 (1975), and *Wood v. Strickland, 43 Law Week* 4293 (1975), that due process requires that students facing suspension from a public school be given oral or written notice of charges against them, be told the basis of the accusation, and have the opportunity to present their version of what happened. (It is also important to note that the court did *not* construe the due process clause as requiring in those situations that students have the opportunity to secure counsel, to confront and cross-examine witnesses, or to call their own witnesses.) School officials may be held liable to pay damages if they knew or reasonably should have known that the action they took would violate the

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constitutional rights of the students affected or if they took the action with malicious intent to deprive the students of such rights.

CONSTITUTIONAL PROTECTION

Students may be successful in claims to constitutional protection even when school officials follow appropriate review procedures if they have been dismissed or suspended solely for their dissemination of ideas. In the *Papish* decision, 410 U.S. 667 (1973), the Supreme Court ordered reinstatement of a university student who had been expelled for distributing on campus an underground newspaper containing "indecent speech." The majority ruled that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of conventions of decency."

Exclusion of students from public schools on racial grounds has been illegal for decades but the validity of racial preference in the selection of students has not been conclusively determined by the courts. The particular question of constitutionality of racial preference posed in *Defunis v. Odegaard,* 416 U.S. 312 (1974) was held moot by the Supreme Court in 1974 on the ground that the student who challenged the school's admission policy was in fact allowed to complete his legal education. Additional court tests of preferential policies are a certainty unless all parties in admissions matters agree to implement the nondiscriminatory standards proposed by Justice Douglas in his separate opinion in the *DeFunis* case.

Second, in the *Roth,* 408 U.S. 564 (1972), and *Sindermann,* 408 U.S. 593 (1972) cases, the U.S. Supreme Court formally abandoned the distinction between constitutional rights and privileges in employment. The traditional view had been that employment is a privilege and that employees had no enforceable rights in the absence of explicit contract terms conferring them. The new view of the Supreme Court was that the faculty and staff of public schools could assert protectable interests in property and liberty by virtue of the 14th amendment and without contractual guarantees.

Of course, the burden of proving a violation of constitutional rights was on the employee, and one could not prove a violation merely by showing that he was fired or not rehired by the college. Nonetheless, the assertion by the justices that employees' constitutional interests in liberty or property can override traditional employers' prerogatives to hire and fire bolstered challenges through litigation to college officials' decisions. The right before being fired to notice of charges and to a hearing before an impartial tribunal has been held applicable to junior college presidents as well as to faculty and staff when their Fourteenth Amendment interests in liberty or property are threatened.

Third, as public opposition to unconstitutional discriminatory practices has grown within our society, and as educational roles, functions, and facilities of junior and community colleges have expanded, federal agencies have taken on greater fiscal and supervisory responsibilities in educational administration.

This has been, at best, a mixed blessing; for despite the welcome relief provided financially hard pressed schools by federal grants or contracts, federal agency requirements and orders that the accompany any form of

aid may develop into challenges to the integrity and viability of the schools. The threat of a cut-off of aid unless all resources are allocated, all records are kept, and all hiring, retention, and promotion practices are followed in conformity with particular agency orders can drive school administrators up the wall.

It is essential to bear in mind that understanding *how* or *why* federal agencies have sought to exercise greater influence and direction over school policies does *not* require automatic acquiescence in *what* the agencies may order.

Just as students, faculty, and staff have protectable rights in dealing with the schools, the schools have protectable rights in dealing with federal officials. It would be at least as unconscionable to cave in before threats from federal agencies today as it would have been to grant non-negotiable demands of dissident students at the height of the era of student unrest.

CHALLENGING ARBITRARY AGENCY ACTIONS

Arbitrariness by federal agencies has no more legal justification or validity than arbitrariness by any other organization or individual. Indeed, constitutional and statutory protections are stronger against governmental bodies than against private individuals or organizations. To illustrate, the Fifth and 14th Amendments to the Constitution have been construed as applying only to actions for which federal or state governmental units or officials are responsible. Purely private acts are not prohibited by these amendments. Thus, while actions of private organizations or individuals may violate contracts or statutes, only actions taken by or under the authority of government are subject to due process and equal protection under the Constitution.

It is a truism that colleges now experience wide ranging exercises of authority by such federal agencies as Health, Education, and Welfare, the Equal Employment Opportunity Commission, the Department of Labor, the National Labor Relations Board, and the Department of Justice that have profound impact on recruitment, enrollment, hiring, advancement, tenure, and dismissal policies as well as on the conduct of educational programs. For example, HEW's Title IX guidelines designed to eliminate sex bias in educational programs have produced widespread fears among college administrators and coaches that money making sports such as football and basketball could be bankrupted by the new requirements. The recent memorandum issued by HEW's Office for Civil Rights explaining the government's regulations for eliminating sex discrimination in athletics covered such specific items as how contact sports should be operated, how athletic scholarships should be awarded and how men and women athletic directors should be hired and fired. The memorandum makes clear that all sports are included and that specific time limits are set for "the attainment of total conformity of institutional policies and practices with the requirements of the regulation."

A key question becomes: What should the college official do when faced with a federal agency's order that she or he believes would jeopardize the policies, integrity, or financial viability of the school? What he or she should *not* do might well be considered first. At the outset, avoid extreme responses:

- don't cave in;
- don't climb up the wall;
- don't fire your staff;
- don't resign;
- don't divorce your spouse;
- don't take a slow boat to China;
- don't organize a protest march to the agency's local office;
- don't write a letter to the editor of your local paper denouncing the agency for usurping your school's responsibilities.

There's time enough for any or all of these actions if and when you've exhausted all the appropriate *do* steps without success.

Three propositions underlie the *do's* for the school administrator to observe:

First, schools and colleges should share experiences in dealing with federal agencies. This enables school officials to gain helpful perspectives on contemplated actions and to utilize desirable precedents to affect new agency decisions as well as the judiciary's review of them.

Secondly all federal agencies' actions must be consistent with their enabling statutes, relevant provisions of the U.S. Constitution, and constructions of both the statutes and the Constitution by the U.S. Supreme Court.

Third, adequate notice, opportunity for a hearing, and fair mechanisms for taking appeals from agency orders are key parts of the statutory and constitutional protections consistently reaffirmed by the courts.

Drawing on these propositions as a base, a series of *do's* are suggested.

EXCHANGE AND REVIEW OF INFORMATION

Consult regularly with colleagues in other schools in your area, with your national associations and with your school or board attorneys about current developments and experiences with federal agency regulations. Time spent in regularly scheduled meetings and briefing sessions to exchange information and hear reports on legal and administrative happenings involving the colleges can anticipate and prevent later headaches in dealing with the agencies.

Needless to say, every college today should have ready access to a competent attorney for briefings and memoranda on developments as well as for assistance in handling negotiations and disputes with the agencies. The more reliable information you have on legal and administrative practices and trends affecting the colleges, the less likely you are to be pressured or intimidated by agency actions directed at you.

When a federal agency acts against you or contemplates taking such action you should request agency officials routinely to provide the college (if they have not already done so) with a statement that makes clear the agency's statutory responsibility, the reasons and purposes behind its ac-

tual or contemplated action, and its procedures leading up to such action including procedures for notice, hearing, appeal, and access to its records. Although reviewing courts are generally sympathetic to agencies' exercises of expertise and discretion, they draw the line at arbitrariness or whimsey that deny affected parties a fair opportunity to know and to challenge whatever the agencies call upon them to do.

It is possible that the federal agency's explanation of its authority, responsibility, and procedures may convince you that its contemplated action is appropriate. In such an event the recommendation is simple: comply. All of us can recognize that the academic world's handling of problems of age, sex, and race in years past was far from ideal.

Even in the absence of overt bias, the system for selection of faculty in the past was not always competitive. Professional associations maintained job listings for their members but most schools and departments regarded them as last resorts. Friends or colleagues were frequently relied on to suggest candidates for jobs, with no systematic canvassing of others who might have greater talents.

The merit system for selection of academic personnel has not had deep roots in the past. To the extent that federal agencies are striving to assure systematic, efficient, and thorough application of a nondiscriminatory merit system they deserve applause and the fullest cooperation. If, on the other hand, they seek to replace old prejudices with new ones they should be challenged to account for validity of their orders through administrative appeals and judicial challenges.

If the agency's authority, purpose, or procedures remain unclear to you after initial correspondence, request a meeting with officials for further clarification. Ask your lawyer to attend the meeting with you but do not encourage the attorney to dominate the session. Lawyers can be most effective in such sessions when they are more visible than vocal. Your lawyer, in short, should advise you rather than direct you. Ask your questions fully, clearly, and concisely. Avoid any accusations, innuendos of wrong-doing, or language that can be construed as a promise or threat of political reprisal. Stay cool, calm, and firm and take accurate notes of the discussion. (Do not seek to use a tape recorder, however, unless you have expressly requested and received permission.)

CONSULTING A LAWYER

If the agency officials decline to answer your questions or if their answers show disregard of your rights to adequate notice, opportunity for a hearing, or capacity to appeal, consult with your lawyer about the next step. In all probability that step should be to tell the officials that you want the name of the current chief of the office in Washington and that you intend to seek assurances that your procedural rights will be protected before you cooperate further with the agency. It would be appropriate to send a copy of your correspondence with the Washington office to your professional association and to your congressman.

Steps four and five are unlikely to prove necessary in most instances since typical government officials are aware of their statutory and constitutional obligations. Ordinarily, they will accord at least the minimum of due process. Nonetheless, the facts that intervention into academic af-

fairs by federal agencies has been relatively recent and that overzealousness may prevail make it essential that agency employees make clear to you their authority and procedures before you extend your cooperation to them.

Continuing disputes over the scope of the Freedom of Information Act may also induce some reluctance on the part of agency officials to give you all the information you request.

While there should not be any difficulty in obtaining basic information about agency authority and procedures, there could still be difficulties in obtaining detailed information from agency files about related cases that have not otherwise been made public. Interpretations by the courts of the Freedom of Information Act and of the public disclosure sections of the Administrative Procedure Act suggest that the public's "right to know" still has definitive limits when it comes to probing federal agency files.

The Supreme Court's most recent statement on the subject in a Federal Aviation Administration case in June 1975, *FAA Administrator v. Robertson*, 43 *Law Week* 4833, emphasizes that nothing in the Freedom of Information Act or its legislative history "gives any intimation that all information in all agencies and in all circumstances is to be open to public inspection." It may be anticipated that further litigation will be necessary before the question is finally settled.

Thus the best advice for school officials on this point is (a) insist upon full information about the agency's authority and procedures since you are clearly entitled to those; (b) don't hesitate to ask for detailed information about agency policies and decisions in related cases. But don't expect agency personnel to turn their files over to you any more than you would turn yours automatically over to them at their request.

With regard to your own files, you should maintain the confidentiality of your relationships with students, faculty, staff, and others to whom assurances of confidentiality have been made. Covert release of information about plans or activities should be prohibited. The disclosure that a public relations official of Washington University at St. Louis provided the Central Intelligence Agency with information on foreign travel by faculty members was a source of embarrassment that led the university to undertake drafting formal guidelines to govern its contacts with all governmental investigators.

Every college should have such guidelines, and they ought to be clear to all persons in the college community. Cooperation with federal agencies should not extend to a breach of confidentiality. If agency officials persist in demanding confidential files, make them proceed by subpoena and instruct your lawyer to oppose the subpoena in court.

The claim of confidentiality of records can protect you when resisting a probe of your files by federal investigators; but such a claim will do nothing to help you when you are called upon to justify hiring, promotion, dismissal, and salary policies that appear to be discriminatory. The traditional tests of whether an order by an administrative agency can be sustained or not are whether the agency's action is arbitrary or capricious and whether there is substantial evidence to support the agency's findings.

The more evidence you withhold from an agency the more difficulty you will have in supporting any subsequent claim that the agency acted

arbitrarily or capriciously or that it lacked substantial evidence for its findings. You must be prepared to refute charges of discriminatory practices and must bear in mind that the standard is not whether you are guilty beyond a reasonable doubt. As construed by courts over the years, there must be substantial evidence in the record to support an agency's findings. Application of the substantial evidence test traditionally takes into account both evidence that supports the agency's position and evidence that is contradictory or from which conflicting inferences can be drawn. You thus increase the likelihood of losing a case if you claim that "we had evidence that could refute the agency's findings, but it was confidential and we couldn't reveal it."

Encouraging representatives of your faculty and staff to participate in drafting guidelines on confidentiality can be helpful in protecting both you and them against adverse agency decisions.

Your procedures for hiring, promotion, dismissal, and setting salaries ought to be explicit and publicly available. You should also maintain comprehensive records on how each search for a new appointee is conducted and what steps have been taken affirmatively to obtain the best qualified person. With whom you've consulted, where you've advertised, the range of candidates you've considered, and how you've screened and decided are all matters on which you should be prepared to come forth with detailed information. Consultations and ads that are likely to receive the attention only of white middle class males will damn you for certain before agencies and courts. Even the most detailed records and the most extensive canvasses may still be inadequate if the net result exclusively favors white males. The argument that qualified blacks, women, Chicanos, and other minorities are not available, or that sharp salary differentials favoring white males are pristine reflections of merit alone will receive short shrift today from most courts as well as agencies.

PROFESSIONAL TIES

This returns us to the emphasis on professional and associational ties. Concrete data on proven successful encounters by school authorities with federal agencies are still sparse on such matters as hiring more women and members of minority groups and eliminating sex bias in collegiate athletics. That there is ferment in these areas today is an understatement; some feel that current events in these spheres are more like a nuclear explosion. A brief consideration of some recent events follows. The point to be stressed here is that your membership and participation in your professional association can be a vital instrument for exchanging essential information and formulating effective policies. In addition to your work with the American Association of Community and Junior Colleges, appropriate members of your staff should be involved in and should draw upon the knowledge and skills of such key organizations as the National Association of College and University Business Officers, the National Association of College and University Attorneys, and the American Council on Education. For reporting on news events the *Chronicle of Higher Education* is outstanding. Effective relationships with federal agencies are not the product of a poker game in which each player keeps his or her own

counsel, consults with no one, and holds the cards close to the chest. The more information you have and share with other educators, the greater the likelihood that rational decisions will be reached and creative and mutually helpful relationships ensue between the colleges and the federal agencies.

SOURCES OF CONFLICT

Recent disputes centering on the enforcement of Title IX of the Education Amendments of 1972 and on threats to withhold millions of dollars in contracts where affirmative action plans were ruled unacceptable could destroy constructive relationships and turn colleges and federal agencies instead into adversaries in a battle potentially fatal to the needs of higher education.

The coerciveness of HEW policy toward the colleges was evidenced by events at the time that the new regulations for enforcing the ban on sex bias were going into effect, and warnings had been issued that the government might withhold millions of dollars in contracts unless the colleges committed themselves to be a "model affirmative action plan" whose details and implications had not been evaluated. The Office for Civil Rights of HEW sent "show cause" orders in June to such schools as the University of Hawaii, New Mexico Institute of Mining and Technology, Purdue, Santa Clara, University of Southern California, University of Texas at Dallas, Virginia Polytechnic, and Washington University of St. Louis to demonstrate why, in view of their alleged failure to formulate acceptable affirmative action programs, they should not be barred from receiving federal contracts. Twenty-one other colleges were told that their eligibility for contracts or grants other federal agencies wished to award them was in jeopardy because they had not adopted the "model affirmative action plan" based largely on one negotiated with the University of California at Berkeley.

Opposition to the Berkeley plan as a model stemmed from its imposition of costly new requirements for data gathering and statistical analysis that might or might not achieve tangible improvements in the hiring and promotion of women and minority groups. The struggle appeared to be over who prescribes the procedures and substance of underlying data gathering rather than over whether affirmative action programs should be implemented.

A special irony, with *Catch 22* dimensions, produced by HEW's authoritarian stance was that institutions could be barred from new federal assistance programs to revise their management techniques because they couldn't afford previously to revise their management techniques. The preceding sentence is not a typographical error. Consider this illustration of its potency: A school fails to accept the model affirmative action plan because it cannot afford the massive expenditure for the new methodologies and statistical compilations the plan requires. The school applies to the National Institute of Education—under the Institute's recently announced program to help schools and school systems develop approaches to planning, decision-making, and management that can meet demands for improved performance while reducing rising costs—for a

grant to revise its recruitment, data gathering, and record management techniques for personnel. If HEW were to follow through on its threats and "show cause" orders last June, such an award automatically would be blocked.

Fortunately, the agency's heavy-handedness appears at this writing to be yielding to an infusion of common sense since the appointment of former President F. David Matthews of the University of Alabama as the new Secretary of HEW. Such initial actions as terming his department a "mess" to administer and informing President Ford at a Cabinet meeting that "you sold me a car without a steering wheel" have signaled Matthews' refreshing candor. The new secretary has been equally frank in his appraisal of agency relationships with the academic community. Openly critical of the amount and costliness of uncoordinated and overlapping paperwork colleges and universities are required to complete, he has insisted that federal regulatory programs "take into account the differences between a university and a construction company" in the rules and procedures they impose.

Agency sensitivity to special dimensions of employee recruitment and advancement in higher education institutions has been criticized by some civil rights leaders as an unwarranted distraction of attention from the central issue of the failure of our universities to act affirmatively in their employment practices and the failure of government to require them to do so. Despite such sincere critiques, equality in employment opportunity is likely to come to our campuses more speedily and permanently by tailoring federal administrative and enforcement practice to the needs, nuances, and realities of academia than by assuming that recruitment, retention, and advancement techniques are identical in the academic world to those in commerce and industry.

The Carnegie Council on Policy Studies in Higher Education has recently come forth with some practical recommendations for "Making Affirmative Action Work," and there is reason to believe that at least some of the proposals will be received sympathetically by federal administrators. In addition to the call for affirmative action plans that take into consideration higher education's special circumstances, the recommendations include allowing educational institutions rather than federal investigators to decide whether hiring goals should be set on a departmental or on a school- or campus-wide basis, and exempting from requirements for submission of hiring timetables and detailed reports any school that "can demonstrate that its proportions of women and minorities . . . approximate pools of qualified persons and are well distributed throughout the institution." For internal campus policies, the council properly calls upon the colleges to establish and implement grievance procedures that comport with due process for all employees. A requirement that administrative remedies be exhausted on campus before a complaint will be considered by a federal agency makes great sense, but the requirement would be an empty ritual unless adequate grievance processing machinery is operative at the particular school.

The apparent enhancement of rationality in approaches of federal regulatory bodies to issues affecting the colleges during the late summer and autumn of 1975 offers a basis for hope—but not for blind faith—that restoration of a partnership between government and education may be

under way. Such central issues as the complexities of affirmative action and of Title IX guidelines for the elimination of sex bias are bound, in any event, to continue to spawn controversies, if not crises, in educators' relationships with federal officials. Cool heads, patience, persistence, a sense of humor, and especially insistence that the protections of due process are owed at least as fully *to* the academic community by government as are owed *by* academia to its constituents are likely to do the most, in the colleges' interactions with the federal agencies, toward achieving both equity and excellence.

SUGGESTIONS FOR READING

The best book for understanding the nature and scope of the administrative process is Kenneth Culp Davis's volume on *Administrative Discretion*, an especially helpful book in terms of understanding the scope of the administrator process. It is worth the reading time for any administrator. Davis's *Administrative Law Treatise* would be standard equipment for any lawyer.

Delving into some of the basic court decisions would be a stimulating and worthwhile experience, though you must guard against thinking yourself to be an armchair lawyer as a result. The landmark case on the meaning of substantial evidence was *Universal Camera Corporation v. NLRB*, 340 U.S. 474 (1951). Four excellent cases on the obligations of administrators to accord students basic constitutional protection are *Healy v. James*, 408 U.S. 169 (1972), *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), *Goss* v. Lopez, 43 *Law Week* 4181 (1975), and *Wood v. Strickland*, 43 *Law Week* 4293 (1975). Racial preference selection of students is discussed though not resolved in *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

Important decisions on the scope and meaning of the Freedom of Information Act are found in *EPA v. Mink*, 410 U.S. 73, (1973), and *FAA Administrator v. Robertson*, 43 *Law Week*, 4833 decided June 23, 1975. Though they did not deal with schools, two cases that embody the Supreme Court's views on the limits of administrative power are *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *U.S. v. U.S. District Court of Eastern Michigan*, 407 U.S. 297 (1972). The justices' reconceptualization of the right to a hearing when protectable interests in property or liberty are asserted was undertaken in two key academic cases, *Board of Regents v. Roth*, 408 U.S. 564 and *Perry v. Sindermann*, 408 U.S. 593 (1972). You will not find Supreme Court decisions dealing explicitly with relationships between colleges and the federal agencies; those lie ahead.

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